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No. _____

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1983

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Appellants,

v.

J-R DISTRIBUTORS, INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does the Fourteenth Amendment to the Federal Constitution prohibit a state legislature from defining language in an obscenity statute by Supreme Court case law rather than the A.L.I. Model Penal Code definition?

a. Did the *Roth v. United States*, 354 U.S. 476 (1957) definition of "prurient" permit the use of the word "lust"?

b. Did *Miller v. California*, 413 U.S. 15 (1973) and its progeny overrule *Roth* in establishing the first leg of the tripartite test of obscenity?

2. Should a federal court invalidate a state obscenity statute on the basis of facial overbreadth when state court decisions have held that a limiting construction must be placed on a state obscenity statute?

a. Should a federal court leave to state court the construction of a newly-enacted state obscenity statute when the State Supreme Court has by case law declared the *Roth-Miller* test to be the law of construction in state obscenity cases?

b. Should a federal court leave to state court a narrowing construction of terms in an obscenity statute when the State Supreme Court has adopted the same construction used by the federal courts in construing federal obscenity statutes involving similar terms?

PARTIES

Appellants: KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington, JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington, JEFFREY C. SULLIVAN, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington, FRED ANDREWS, in his official capacity as City Attorney for the City of Yakima, Washington, NORM MALENG, Prosecuting Attorney of King County in his representative capacity only.

Appellees: J-R DISTRIBUTORS, INC.; AZURE ENTERTAINMENT CORPORATION OF WASHINGTON; JACK R. BURNS, in his representative capacity as EXECUTOR OF THE ESTATE OF SELOM F. BURNS; PLAYTIME THEATRES, INC., a Washington Corporation; KUKIO BAY PROPERTIES, INC., a Washington Corporation; SPOKANE ARCADES, INC., a Washington Corporation; THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON; MADRONA PUBLISHERS, INC., SUPERIOR PUBLISHING COMPANY; WASHINGTON LIBRARY ASSOCIATION; PACIFIC NORTHWEST BOOKSELLERS ASSOCIATION; MOTION PICTURES EXHIBITORS OF WASHINGTON, ALASKA, AND NORTHERN IDAHO; WASHINGTON STATE COUNCIL OF TEACHERS OF ENGLISH; WASHINGTON LIBRARY MEDIA ASSOCIATION; and THE COMMUNITY COLLEGE LIBRARIAN and MEDIA SPECIALISTS ASSOCIATION OF WASHINGTON.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 725 F.2d 482 (1984), and is reproduced as Appendix A. The opinion of the United States District Court, Eastern District of Washington is reported at 544 F.Supp. 1034 (1982), and is reproduced as Appendix B.

JURISDICTION

This appeal is taken from a judgment of the Court of Appeals for the Ninth Circuit which invalidated, *in toto*, a Washington state anti-obscenity statute on the ground

that the statute's definition of the term "prurient" by including the word "lust" in the definition rendered the Act unconstitutional under *Miller v. California*, 413 U.S. 15 (1973). The Court of Appeals, 2-1 decision, reversed the District Court for the Eastern District of Washington which had held that the Washington statute complied with *Miller*.

Jurisdiction of the district court was conferred by 28 U.S.C. § 1331, and jurisdiction of the Court of Appeals was exercised under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3).

The Court of Appeals judgment was entered February 6, 1984 and is included as Appendix C. The order denying rehearing was entered April 6, 1984 and is attached as Appendix D. A notice of appeal was filed in that court on June 21, 1984 and an amended notice of appeal was filed on June 25, 1984, each attached as Appendix E and F. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment of the United States Constitution.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacibly to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment, § 1 of the United States Constitution.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Wash. Sess. Laws 1982, ch. 184, 47th Legis., HB 626 is reproduced as Appendix G.

STATEMENT OF THE CASE

A. Washington's Statutory System

The 1982 Washington State Legislature enacted House Bill 626 and it was signed into law by the Governor on April 1, 1982. (Wash. Sess. Laws, ch. 184, 47th Legis., HB 626 (see Appendix G.))[1] The statute established civil and criminal penalties for maintaining a "moral nuisance." On April 5, four days after HB 626 was signed by the Governor, appellees J-R Distributors, Inc. and Azure Entertainment Corporation of Washington filed separate suits challenging the constitutionality of the Act in the United States District Court for the Eastern District of Washington. Subsequently, five other plaintiffs filed separate suits, all seven cases being consolidated by the District Court. On April 13, prior to any actions under the Act, the District Court issued a preliminary injunction against enforcement of the Act by appellants.

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[1]The main definition found in the state statute is that of lewd matter:

"(2) 'Lewd matter' is synonymous with 'obscene matter' and means any matter:

(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which explicitly depicts or describes patently offensive representations or descriptions of:

(i) Ultimate sexual acts, normal or perverted, actual or simulated; or

(ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions; or lewd exhibition of the genitals or genital area; or

(iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

(c) Which, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value." Appendix G-1, § 1(2).

The civil portion of House Bill 626 declared as "moral nuisances" certain described places having lewd films or publications. Any person who, with knowledge, maintained a "moral nuisance" as described could be made the subject of a civil action with civil penalties to be judicially determined. The criminal portion of the Act made the promotion of pornography by any person who, with knowledge and for profit-making purposes, sold, exhibited, displayed or produced lewd matter a Class C felony.

House Bill 626 contained a definition of "lewd matter," synonymous with "obscene matter" consistent with the conjunctive tripartite test set forth in *Miller*. The term "prurient" used in the first prong of the *Miller* tripartite test was further defined by the state Act by a definition which included the use of the term "lust."[2]

B. The Rationale of the Decision Below.

The Court of Appeals in a 2-1 decision held HB 626 unconstitutional, *in toto* because the word "lust" was included in the definition of "prurient."[3] As the court viewed it, this inclusion of the term "lust" was unconstitutional for three reasons:

First. The circuit court majority gave lip service to this Court's statement that " 'material having a tendency to excite lustful thoughts' was a definition of material 'appealing to prurient interest' " (Appendix A-17; *Roth v. United States*, 354 U.S. 476, 487 n. 20 (1957)). But the court nevertheless read *Roth* as sanctioning only the A.L.I. Model Penal Code definition of "prurient," which does not use the term "lust" or "lustful," and therefore invalidated any statutory definition using those terms.

Second. The court below found the use of "lust" con-

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[2]"Prurient means that which incites lasciviousness or lust." Appendix G, § 1(8).

[3]In dictum, the Court of Appeals also held the civil penalties portion of the statute unconstitutional for allowing a fine to be based, even in part, on proceeds from constitutionally protected material. This section of the statute, as noted in the dissenting opinion, is severable, allowing the rest of the Act to remain intact.

stitutionally impermissible because of its changing meaning in contemporary usage. By way of example, the court noted that a post-*Roth* dictionary definition of "prurient" no longer included the term "lust," and that a presidential candidate in a 1976 *Playboy* interview admitted having looked upon women with "lust." The Court observed that certainly "lust" could not have an evil connotation if a presidential candidate would publicly admit having had it in his heart.[4]

Finally, the court concluded that, no matter how one construed the *Roth* definition of "prurient," *Miller* had replaced the *Roth* definition, and, as a result, the only presently acceptable definition of "prurient" is that provided in the A.L.I. Model Penal Code.

Thus, the court declared the Washington Legislature's definition of "prurient" unconstitutional, found it unseverable from the rest of the Act, and refused to allow a state court to find a fixed, constitutionally permissible meaning for the terms "lust" and "prurient."

The dissent in the court below concluded that the statutory definition of "prurient" cannot be held unconstitutional because it is based on this Court's precedent, *i.e.*, *Roth*. With respect to the *Roth* definition, the dissent concluded that the *Roth* footnote should be read as a whole; it describes different, yet equally acceptable ways to define the term "prurient." The dissenting judge also addressed the concern of changing definitions by emphasizing the criteria of "contemporary community standards" found in the first prong of the *Miller* tripartite test. He noted that purely legal definitions are more dependent on the Supreme Court than on a particular edition of a dictionary or an interview in *Playboy* magazine. Lastly, the dissent concluded that *Miller* affirmed a "judicial meaning" of pruri-

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[4]The dissenting judge observed that purely legal definitions are less dependent on an interview in *Playboy* magazine than on the Supreme Court. Further, the judge noted that the majority had misinterpreted the views of the presidential candidate who "* * * characterized lust as a sin requiring divine forgiveness, not as something 'acceptable' in our community." Appendix A-38; *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 501 (1984).

ent derived from *Roth* and that this Court had never held that the A.L.I. Model Penal Code provided the only acceptable definition. Thus, the dissent found the statutory definition of "prurient" constitutional — adding that, "at worst" the use of "lust" was subject to state court construction in light of *Miller*.[5]

The court below thus fashioned a legal ambush for the Washington Legislature. Having tracked the definition of this Court, it ran afoul of a "changing definition standard" here fashioned by the Court of Appeals.

C. Record Identification of the Question Presented.

The abstention question presented in this appeal was first raised in the Consolidated Memorandum of Authorities in Response to Plaintiffs' Memorandum submitted to the District Court May 18, 1982 which also incorporated the Memorandum of Authorities submitted on the same date by appellant Brockett wherein the question is also raised. The District Court did not abstain because it concluded the statute was constitutional. On appeal to the Court of Appeals, the Consolidated Brief of Appellees (appellants herein) first raised the argument at page 8, under the heading "1. Overbreadth."

The overbreadth question presented in this appeal was first raised in the Memorandum of Points and Authorities in Support of Temporary Restraining Order and Preliminary Injunction submitted to the District Court April 6, 1982 and filed by appellees J-R Distributors, Inc. and Azure Entertainment Corporation of Washington. While the District Court granted the motion, in its ultimate decision entered July 2, 1982, the court concluded that the definition of "prurient" in the statute was constitutional. On appeal to the Court of Appeals, the brief of the afore-

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[5]The District Court found the challenge to the definition subjected the court to "semantical nit picking" which was avoided when one looked at the definition of obscenity as a function of the conjunctive tripartite test rather than the single statutory section defining "prurient." Appendix B-10; *Spokane Arcades, Inc. v. Eikenberry*, 544 F.Supp. 1034, 1038 (E.D. Wash. 1982).

mentioned appellees raised the question at page 3, under the heading "Statement of Issues." The Court of Appeals in a 2-1 decision, reversed the district court, resolving the question adversely to the State of Washington.

THE FEDERAL QUESTION IS SUBSTANTIAL

The federal question is substantial and merits the noting of probable jurisdiction for two reasons. First, the decision of the Court of Appeals for the Ninth Circuit is in irreconcilable conflict with *Roth* and the "judicial meaning" of prurient set forth in *Miller* and derived from *Roth*. The changing definition standard adopted by the court below is not one which has been adopted by this Court itself. The confusion arising from this conflict would be compounded, not diminished, by a per curiam affirmance of the Court of Appeals in this case. State legislatures should not be caught in a legal ambush for having drafted legislation tailored to Supreme Court precedent such as *Roth*.

Secondly, a practical but fundamental question of federalism is here involved, *i.e.*, the respective roles of federal and state courts in dealing with state anti-obscenity statutes. Simply put, are such statutes to be struck down simply because the purveyors of obscene materials rush to the federal statute, and preclude a state court from giving a narrower and constitutionally permissible reading? Does the normal principle that *state* courts are to give the final reading of state statutes drop out of the picture when anti-obscenity statutes are involved?[6]

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[6]Note, in this regard, the practical importance of the issuance of a preliminary injunction by a federal court against enforcement of a state obscenity statute. It precludes state authorities from obtaining a reading of the statute in state courts through any enforcement action. In any race to the court house, state authorities cannot even leave the starting line. This does not mean that preliminary injunctions are improper in cases such as this; rather, it shows the practical importance of federal courts allowing state courts to construe such statutes through procedures other than an actual enforcement action; *e.g.*, through certification to state courts of questions of state law (Washington state certification procedure is found at Rev. Code Wash. ch. 2.60). See pp.

We briefly take up these two points.

I. The Decision of the Court of Appeals is in Conflict with Roth v. United States, 354 U.S. 476 (1957) and Miller v. California, 413 U.S. 15 (1973).

While obscenity is not protected by the First and Fourteenth Amendments, defining what is obscene has been a long and arduous undertaking. *Miller v. California, supra; Roth supra.*[7] However, this Court has agreed on a "judicial meaning" for obscenity, known as the *Roth-Miller* test. After *Roth* in 1957 and prior to *Miller* in 1973, this Court in *Redrup v. New York*, 386 U.S. 767, 770-771 (1967) appeared to adopt a procedure which placed the Court in the role of an unreviewable board of censorship for the 50 states. In *Miller* this Court set basic guidelines for states which, if provided by state statute "as written or construed," would allow the federal courts to assume the role of an independent reviewer of constitutional claims. *Miller, supra* at 25. The Washington state statute at issue tracks the tripartite test adopted in *Miller.*

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest,

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13-15, *infra*. For reasons there discussed, we have little doubt that the Washington Supreme Court would give the key terms in this case, "lust" and "prurient," a constitutionally valid construction. And we also have little doubt that appellees were quite aware of this, and accordingly have adopted a strategy — so far successful — of trying to ensure that Washington courts are cut off from any opportunity to construe this statute.

[7] "Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '* * * [T]he Constitution does not require impossible standards,' all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices * * *' " *Roth, supra* at 491-492, citing *United States v. Petrillo*, 332 U.S. 1, 7, 8 (1947); see also *Miller, supra*, at 27 n. 10.

> *Kois v Wisconsin*, supra, at 230, quoting *Roth v United States*, supra, at 489, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller, supra* at 24.

The first requirement of the test was established in *Roth*, reaffirmed in *Miller*. The Washington statute tracks it almost exactly.[8] Appendix A-16; *J-R Distributors, Inc. v. Eikenberry, supra* at 490. Nonetheless, the Ninth Circuit Court in its 2-1 decision found the use of the statutory term "lust" in defining "prurient" to be overbroad, rendering the entire statute unconstitutional.[9] Such a conclusion is in clear conflict with *Roth*.

In *Roth* and its companion case, *Alberts*, the Court considered (in a single decision) the constitutionality of a state and a federal obscenity statute. Alberts appealed a California criminal conviction while Roth appealed a federal criminal conviction, each conviction being based on obscenity statutes. The *Roth* decision noted that the trial judge in the California prosecution had utilized the test set forth in a state court decision, *i.e.*, whether the "material has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or *arousing lustful desires.*" *Roth, supra* at 486. (Emphasis added).[10] Similarly, in the federal prosecution, the district court instructed the jury:

> "The words 'obscene, lewd or lascivious' as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to *incite lustful thoughts.*" *Roth, supra* at 486 (Emphasis added).

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[8]See footnote 1.

[9]"Prurient means that which incites lasciviousness or lust" [Wash. Sess. Laws 1982, ch. 184, 47th Legis., HB 626; § 1(8). See also Appendix G-2, § 1(8).

[10]*People v. Wepplo*, 78 Cal.App.2d Supp. 959, 961, 178 P.2d 853 (1947). "A book is obscene 'if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or *arousing lustful desires.*' " (Emphasis added).

This Court decided that both trial courts used the proper definition of obscenity, each of which included the word lustful. *Roth, supra* at 489.

The Court of Appeals majority in this case nonetheless found "*Roth* actually concluded with the A.L.I. Model Penal Code definition" which did not include "lust." Appendix A-17; *J-R Distributors, Inc. v. Eikenberry, supra* at 490.

It is true that a footnote in *Roth, supra* at 487, n. 20, defining the term "prurient interest," concluded with the A.L.I. Model Penal Code definition.[11] But since it was only the last one quoted, it cannot be said that this Court thus declared it to be the only acceptable definition. Nonetheless that is what the Court of Appeals here found. The "judicial meaning" *Miller* refers to, derived from *Roth*, is a recognition of the case law. The A.L.I. Model Penal Code definitions provide a statutory definition which is judicially acceptable. *Roth, supra,* at 487 n. 20; *Miller, supra* at 18-19 n. 2.

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[11] "I.e., material having a tendency to excite lustful thoughts. Webster's New International Dictionary (Unabridged, 2d ed, 1949) defines *prurient*, in pertinent part, as follows:

"* * * Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd. * * *"

Pruriency is defined, in pertinent part, as follows:

"* * * Quality of being prurient; lascivious desire or thought. * * *"

See also Mutual Film Corp. v. Industrial Com. 236 US 230, 242, Ann Cas 1916C 296, where this Court said as to motion pictures: "* * * They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a *prurient interest may be excited and appealed to* * * *"

We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A. L. I., Model Penal Code, § 207.10(2) (Tent Draft No. 6, 1957), viz.:

"* * * A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. * * *" See comment, id., at 10, and the discussion at pages 29 et seq." (Emphasis added)

> "* * * there is a significant distinction between the definition used in the prosecutions before us, and the American Law Institute formula. If, therefore, the latter is the correct standards, as my brother Brennan elsewhere intimates, then these convictions should surely be reversed. Instead, the Court merely assimilates the various tests into one indiscriminate potpourri." *Roth, supra* at 500, Harlan, J. concurring in the result in No. 61 (Alberts), and dissenting in No. 582 (Roth) (footnote omitted).

Subsequent to *Miller*, this Court remanded a case involving a challenge to the Nebraska obscenity law, for construction in light of *Miller*. *Little Art Corp. v. State of Nebraska*, 414 U.S. 992 (1973). On remand, the Nebraska State Supreme Court found the Nebraska law fully complied with the requirements of *Miller*. That law allows for either of the definitions of "prurient interest" noted in *Roth*.

> "* * * Appeals to the prurient interest, which is to *excite lustful thoughts*, or a shameful or morbid interest in nudity, sex, or excretion which goes substantially beyond the customary limits of candor." *State v. Little Art Corp.*, 191 Neb. 448, 451, 215 N.W.2d 853 (1974) (emphasis added).

Subsequently, this Court reviewed and dismissed an appeal from the Ohio Supreme Court involving an obscenity statute, *Art Theatre Guild, Inc. v. Ewing*, 421 U.S. 923 (1975), which defined obscenity to include "a dominant tendency to arouse lust * * *" *Id.* at 923.[12]

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[12]The full Ohio statutory definition was as follows:

"'(A) Any material or performance is "obscene" if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to *arouse lust* by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to *arouse lust* by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a series of displays or description of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the

The Washington Legislature, in adopting the statute here at issue, followed the option provided by this Court in choosing between the case law *or* the A.L.I. Model Penal Code constitutionally-acceptable definitions of obscenity. In turn, having used this Court's case law definition (with which two judges of the Court of Appeals disagree) Washington has now had its entire statute declared unconstitutional. This appeal thus involves an important application of this Court's decisions in *Roth* and *Miller*, neither of which has been overruled, and should govern this case.

The appellate court mistakenly relied on language in a *Playboy* magazine interview and changing dictionary definitions. Appendix A-18, 10; *J-R Distributors, Inc. v. Eikenberry, supra* at 490-491. The changing of the meaning of words through contemporary usage is not relevant because changing attitudes in the society are addressed by the contemporary community standards set forth in the first of the tripartite test in *Miller*. Appendix A-38; *J-R Distributors, Inc. v. Eikenberry*, Wallace dissent, *supra* at 501. The definition of obscenity does not simply rely on matter appealing to prurient interest, *i.e.*, that "which incites lasciviousness or lust." It is modified not only by the contemporary community standard but "the three elements of the test (*Miller*) must coalesce before material may be proscribed as 'obscene.' "[13] *State v. J-R Distributors, Inc.*, 82 Wn.2d 584, 594, 512 P.2d 1049 (1973); Appen-

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cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, education, sociological, moral, or artistic purpose.' " (Emphasis added)

[13]The court below overlooked not only the contemporary community standard but the necessity that the three elements of the test are applied conjunctively. This is evidenced by the court's reference to the fact that "* * * leading couturiers, perfumers and manufacturers of soft drinks, soap suds and automobiles, * * *" might be subject to the Act. Such would be the case only if the questioned matter explicitly depicted or described patently offensive representations or descriptions as set forth by the state statute in the second prong of the tripartite test *and* the other two prongs of the test were likewise applicable. Appendix A-11; *J-R Distributors, Inc. v. Eikenberry, supra* at 492.

dix B-10; *Spokane Arcades, Inc. v. Eikenberry*, 544 F.Supp. 1034, 1038 (E.D. Wash. 1982).

The conflict between the Court of Appeals decision and *Roth-Miller* is irreconcilable. Further, the changing definition standard set forth by that court has not and should not be adopted by this Court. The Washington Legislature drafted the 1982 obscenity statute in compliance with Supreme Court precedent only to be caught in the legal ambush presented by the Court of Appeals. State legislators must be able to rely and be guided by Supreme Court precedent. The practical resolution to this problem is the next important issue to be addressed.

II. Facial Overbreadth Should Not be Used to Invalidate State Legislation when a Limiting Construction could be or has been Placed on a State Obscenity Statute.

In *Miller* this Court made clear that the role of the federal courts was to review constitutional claims *when necessary*. To this end the *Miller* decision (1) provided basic guidelines, a tripartite test, for defining obscenity and (2) emphasized the importance of construction of state obscenity laws by the states. *Miller, supra* at 24-25, 24 n. 6. The commitment to leave construction of state obscenity laws to state courts was reemphasized in *United States v. 12 200-FT. Reels of Film*, 413 U.S. 123, 130 n. 7 (1973) wherein this Court stated "* * * We *must* leave to state courts the construction of state legislation * * *." (emphasis added). Facial overbreadth is not an exception, it is to be employed by the federal courts sparingly and "* * * only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). "Facial overbreadth has not been invoked when a limiting construction *has been or could be* placed on the challenged statute." *Id.* at 613 (emphasis added).

In the instant proceeding a state obscenity statute was challenged in federal court four days after it became effective (April 1, 1982). An injunction was issued so no

actions have been filed and state courts have not had the opportunity to construe the statute.

The Washington Supreme Court has previously made clear that it would comply with the direction in *Miller* and authoritatively so construe state obscenity statutes. *State v. J-R Distributors, Inc.*, 82 Wn.2d 584, 594, 512 P.2d 1049 (1973). The state court there recognized that *Roth* remained viable and basic to the holdings in *Miller* and its progeny. *Id.* at 600. Thus, in answer to an overbreadth challenge to the definition of obscenity, the Washington Supreme Court construed the statute in accordance with the *Roth-Miller* test. *Id.* at 601-602.

The policies of federalism and comity require that the state court here similarly be given the opportunity to first construe a state obscenity statute and then leave to the federal court the review of any remaining constitutional claims if necessary. *Miller, supra* at 25. State courts' construction has been used and affirmed by the federal courts since the policy set forth in *Miller*.[14] The Washington Supreme Court, when given the opportunity, has construed a state obscenity statute consistent with *Roth-Miller* and there is no reason to doubt that a similar construction would occur regarding the statute at issue herein.

Assuming, *arguendo*, the statutory definition of "prurient" is subject to an overbreadth challenge, it is capable of a narrowing state judicial construction consistent with *Miller*. This Court noted its duty to authoritatively construe federal statutes where a "serious doubt of constitu-

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[14] *Fehlhaber v. North Carolina*, 675 F.2d 1365 (4th Cir. 1982); see also *Ward v. Illinois*, 431 U.S. 738 (1977) where this Court found the state court plainly intended to conform to *Miller* and there was no reason to doubt it. Similarly, in a challenge to the Wisconsin statute, the Supreme Court of that state construed the state law consistent with *Miller*. *State ex rel. Chobot v. Circuit Court*, 61 Wis.2d 354, 212 N.W.2d 690 (1973). Nonetheless, the federal court ruled the statute unconstitutionally vague under *Miller*. *Amato v. Devine*, 496 F.2d 441 (7th Cir. 1974). On appeal this Court vacated the judgment and remanded in light of the state court construction in *Chobot*. *Devine v. Amato*, 419 U.S. 1014 (1974). The federal appellate court then held the statute constitutional in light of the state court's construction. *Amato v. Devine*, 558 F.2d 364 (7th Cir. 1977).

tionality is raised." *United States v. 12 200-FT. Reels of Film, supra* at 130 n. 7. Specifically, with respect to words such as "obscene," "lewd" or "lascivious" the Court has said:

> "[W]e are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific "hardcore" sexual conduct given as examples in *Miller*." *Id.* at 130 n. 7 (citation omitted)

The Washington statute at issue specifically adopts the examples set forth in *Miller*. See Appendix G-1, § 1(2)(b)(i), (ii). *Miller, supra* at 25. Further, the State Supreme Court has noted and adopted the construction set forth in *12 200-FT. Reels of Film. State v. J-R Distributors, Inc., supra* at 601 n. 3. Thus, this Court has recognized an acceptable narrowing construction to be applied herein which is the same judicial approach to construction of obscenity statutes adopted by the Washington State Supreme Court.

The Washington statute is capable of a narrowing construction and the Washington Court has, in the past, adopted that construction when required to comply with the *Roth-Miller* test. Consistent with *Miller*, this statute should be construed by the State Court to avoid the past practice of federal courts acting as boards of censorship.

CONCLUSION

For the reasons set forth above, probable jurisdiction should be noted, and the decision of the Court of Appeals reversed.

DATED this _____ day of July, 1984.

Respectfully submitted,

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Deputy Attorney General

Additional Appellants:

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J-R DISTRIBUTORS, INC.,
Plaintiff-Appellant,

v.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; Donald C. Brockett, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington, James Sloane, in his official capacity as City Attorney for the City of Spokane, Washington, Jeffrey C. Sullivan, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington, and Fred Andrews, in his official capacity as City Attorney for the City of Yakima, Washington, Defendants-Appellees.

AZURE ENTERTAINMENT CORPORATION OF WASHINGTON,
Plaintiff-Appellant,

v.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; Donald C. Brockett, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington; and James Sloane, in his official capacity as City Attorney for the City of Spokane, Washington, Defendants-Appellees.

JACK R. BURNS, in his representative capacity as Executor of the Estate of Selom F. Burns, Plaintiff-Appellant,

v.

The Honorable KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only, Defendant-Appellee.

PLAYTIME THEATRES, INC. a
Washington Corporation,
Plaintiff-Appellant,

v.

The Honorable KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative

capacity, only, Donald C. Brockett, Prosecuting Attorney of Spokane County, in his representative capacity only, and James Sloane, Spokane City Attorney, in his representative capacity only, Norm Maleng, Prosecuting Attorney of King County in his representative capacity only, Defendants-Appellees.

KUKIO BAY PROPERTIES, INC., a Washington Corporation, Plaintiff-Appellant,

v.

NORM MALENG, Prosecuting Attorney of King County, in his representative capacity only, Defendant-Appellee.

SPOKANE ARCADES, INC., a Washington Corporation, Plaintiff-Appellant,

v.

The Honorable KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only, Donald C. Brockett, Prosecuting Attorney of Spokane County, in his representative capacity only, and James Sloane, Spokane City Attorney, in his representative capacity only, Defendants-Appellees.

The AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON; Madrona Publishers, Inc., Superior Publishing Company; Washington Library Association; Pacific Northwest Booksellers Association; Motion Picturers Exhibitors of Washington, Alaska, and Northern Idaho; Washington State Council of Teachers of English; Washington Library Media Association; and The Community College Librarian and Media Specialists Association of Washington, Plaintiffs-Appellants,

v.

The Honorable KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only, Defendant-Appellee.

Nos. 82-3441, 82-3442 and 82-3500
through 82-3504.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 6, 1983.
Decided Feb. 6, 1984.

Challenges were brought to Washington antiobscenity statute. The United States District Court for the Eastern District of Washington, Robert J. McNichols, Chief Judge, 544 F.Supp. 1034, upheld the statute and appeal was taken. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) facial challenge was proper; (2) there was no basis for abstention; (3) definition of "prurient" which included "lust" was unconstitutional; and (4) provision of statute imposing fine based upon all sales from place where moral nuisance occurred, including sales of protected material, was unconstitutional.

Reversed.

Wallace, J., dissented and filed an opinion.

1. Constitutional Law — 42.1(3)

Civil liberties organization would have standing to sue over constitutionality of antiobscenity statute if any of its members suffered or was threatened with injuries which would create a justiciable case.

2. Federal Courts — 45, 813

Forum non conveniens determination is committed to the sound discretion of the trial court which will be reversed only where there has been an abuse of discretion.

3. Federal Courts — 101

Evidence sustained finding that interests of the parties, convenience to the attorneys, judicial economy, and public interest would be served by disposing of various challenges to antiobscenity statute in a single hearing already scheduled in a case in another district and that instant case should be transferred to that district on forum non conveniens grounds.

4. Federal Courts — 13

Facial challenge to constitutionality of antiobscenity statute was proper.

5. Federal Courts — 13

In evaluating facial challenge to constitutionality of statute, court must consider whether there are any readily apparent constructions capable of saving the statute, in a single state prosecution, from the constitutional challenges presented in federal court.

6. Federal Courts — 813

Reviewing court will reverse the district court on the issue of abstention only when there has been an abuse of discretion.

7. Federal Courts — 43

In order for *Pullman* abstention to be appropriate, federal court must find that suit touches sensitive area of social policy into which federal courts ought not to enter unless no alternative for adjudication exists, that a definitive ruling on the state issues in question would end the controversy, and that the possibly determinative issue of state law is doubtful.

8. Federal Courts — 43

In view of fact that several key provisions of antiobscenity statute were not susceptible to saving constructions, *Pullman* abstention was inappropriate.

9. Federal Courts — 43

Burford abstention was not appropriate with respect to facial challenge to antiobscenity statute.

10. Federal Courts — 43

In the absence of any state criminal or civil action having been instituted under antiobscenity statute, *Younger* abstention was not proper with respect to federal court challenge to the constitutionality of the statute.

11. Constitutional Law — 90.1(8)

To assure that protected speech is not impermissibly regulated, even subtle deviations from the *Miller* standards must be carefully examined.

12. Constitutional Law — 90.1(1)
Obscenity — 2.5

Washington antiobscenity statute which defined "prurient" as "that which incites lasciviousness or lust" was unconstitutional because of the inclusion of "lust" in the definition of "prurient." West's RCWA 7.48.050(2)(a).

13. Constitutional Law — 90.1(1)
Obscenity — 5.1

Expressions which may merely stimulate sexual longing or desire are entitled to the full range of First Amendment protections and cannot be constitutionally branded as obscene. U.S.C.A. Const.Amend. 1.

14. Obscenity — 2.5

Because antiobscenity statute unconstitutionally infringed on protected expression, the entire statute was unconstitutional.

15. Obscenity — 2.5

It is impermissible, in an antiobscenity statute, to provide that the amount of a fine shall be based, even in part, on proceeds from constitutionally protected material; statute which defined nuisance as the place where obscene items were sold and which directed that the total profits from that place be taken into consideration when imposing a fine was unconstitutional. West's RCWA 7.48.050.

John H. Weston, David M. Brown, G. Randall Garrou, Brown, Weston & Sarno, Beverly Hills, Cal., Carl Maxey, The Maxey Law Firm, Spokane, Wash., for plaintiffs-appellants.

Debbie D. Carnevali, Adm. Asst. Deputy Atty. Gen., Christine Gregorie, Deputy Atty. Gen., Olympia, Wash., for defendants-appellees.

Richard C. Robinson, Spokane, Wash., for James C. Sloane.

David A. Saraceno, Spokane, Wash., Robert Eugene Smith, Encino, Cal., Charles S. Hamilton, III, Seattle, Wash., for Donald C. Brockett.

Appeal from the United States District Court for the Eastern District of Washington.

Before GOODWIN, WALLACE, and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

Plaintiffs in these consolidated appeals challenge the constitutionality of Washington state's comprehensive anti-obscenity statute. Plaintiffs contend that various provisions of the statute are unconstitutionally overbroad or vague; that the statute's definition of obscenity varies impermissibly from that established by the Supreme Court; that the statute's penalty provisions and lack of procedural safeguards serve to chill protected first amendment expression; and that the sanctions imposed by the statute violate the eighth amendment's prohibition against cruel and unusual punishment. After a trial on the merits, the district court rejected plaintiffs' challenges and refused to enjoin enforcement of the statute. We find that the anti-obscenity statute is unconstitutional and reverse.

BACKGROUND

In 1977 the voters of the state of Washington adopted an initiative measure that established procedures to temporarily and permanently enjoin the operation of moral nuisances. Wash.Rev.Code §§ 7.48.050-100 (West.Supp.1980). In a decision affirmed by the Supreme Court, we found that this moral nuisance law was unconstitutional because it failed to provide procedural safeguards necessary for the protection of first amendment freedoms. *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135, 137-39 (9th Cir.1980), *aff'd*, 454 U.S. 1022, 102 S.Ct. 557, 70 L.Ed.2d 468 (1981).

Apparently in response to the fact that the voters' initiative measure had been declared unconstitutional, the Washington state legislature enacted into law the statute that plaintiffs challenge here. This statute, known as House Bill 626,[1] establishes a dual system of civil and

[1] The relevant portions of House Bill 626 are reprinted in the Appendix to this opinion.

criminal penalties for those who maintain "moral nuisances" as defined in Section II.

[1] House Bill 626 became effective on April 1, 1982. On April 5, 1982, plaintiffs J-R Distributors and Azure Entertainment Corporation filed separate suits in the United States District Court for the Eastern District of Washington. These suits, brought pursuant to 42 U.S.C. § 1983 (Supp. IV 1980), sought declaratory and injunctive relief against the statute's enforcement. Subsequently, the five other plaintiffs filed similar law suits. All seven cases were consolidated by the district court.[2]

On April 13, 1982, the district court issued a preliminary injunction against enforcement of House Bill 626. The case proceeded to trial before the district judge, and on July 2, 1982, the court rejected plaintiffs' challenges and affirmed the constitutionality of House Bill 626. *Spokane Arcades, Inc. v. Eikenberry,* 544 F.Supp. 1034 (E.D.Wash. 1982). Although the district judge denied plaintiffs' motion for an injunction pending appeal, he did stay his judgments to allow plaintiffs to seek a stay pending appeal from this court. Ninth Circuit Rules of Appellate Procedure, Rule 6(i). On October 13, 1982, we granted

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[2] Throughout these proceedings, various objections have been raised to the standing of a few of the many plaintiffs in the seven consolidated cases. *See, e.g., Spokane Arcades, Inc. v. Eikenberry,* 544 F. Supp. 1034, 1037 n. 1 (E.D.Wash.1982). In particular, the standing of the American Civil Liberties Union as a plaintiff in one of the cases has been challenged before this Court. The district court's opinion was that "[i]n view of the disposition of this matter, . . . the question is largely academic." *Id.* We share that view. *See generally Havens Realty Corp. v. Coleman,* 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982), *quoting Taggart v. Weinacker's, Inc.,* 397 U.S. 223, 225, 90 S.Ct. 876, 877, 25 L.Ed.2d 240 (1970) (per curiam); *Bullock v. Carter,* 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972); *Gulf Oil Co. v. Federal Regulatory Commission,* 706 F.2d 444 (3d Cir. 1983).

It is worth noting however, that the ACLU has standing to sue in this case if any one of its members suffers or is threatened with injuries that would create a justiciable case. *See generally Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Black Faculty Association v. San Diego Community College,* 664 F.2d 1153 (9th Cir.1981). Because we find that House Bill 626 is unconstitutionally overbroad, it seems likely that some of the ACLU's members would be affected by the statute's impermissible restrictions on protected speech.

the motions of plaintiffs J-R and Azure and enjoined the enforcement of House Bill 626 pending resolution of this appeal.

[2, 3] We exercise jurisdiction under 28 U.S.C. § 1331 (1976), because plaintiffs' claims raise federal questions, and under 28 U.S.C. § 1343(3) (1976), because plaintiffs allege civil rights violations under section 1983.[3]

FACIAL CHALLENGES TO ALLEGEDLY UNCONSTITUTIONAL STATUTES

Plaintiffs' constitutional attacks on House Bill 626 were launched almost immediately after the statute became effective. Prior to trial, the district court issued an injunction against enforcement of the statute, and we have done the same for the pendency of this appeal. Conse-

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[3] King County Prosecuting Attorney Norm Maleng, a defendant to two of the suits being appealed, raises several objections to the district court's assertion of jurisdiction over him. First, Maleng argues that venue in the *Kukio Bay Properties* case was improperly transferred from the Western District of Washington, where Maleng performs his official duties, to the Eastern District of Washington, where the various other lawsuits were filed. *See* 28 U.S.C. § 1404(a) (1976). We disagree. The *forum non conveniens* determination is committed to the sound discretion of the trial court. We will reverse such a determination only when there has been an abuse of discretion. *See, e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). *See also Norwood v. Kirkpatrick*, 349 U.S. 29, 31-32, 75 S.Ct. 544, 546-547, 99 L.Ed. 789 (1955) (trial court has more discretion to transfer to another federal court pursuant to § 1404(a) than to dismiss on grounds of *forum non conveniens*). In this case, the district judge for the Western District of Washington correctly found "that the interests of the parties, convenience to the attorneys, judicial economy, and the public interest are all served by disposing of this matter in one hearing" already scheduled in the Eastern District of Washington.

Second, Maleng contends that the plaintiff in the *Playtime Theaters* suit owns no theaters or bookstores in King County and thus could not possibly be subject to prosecution by him. In its brief to this court, however, Playtime Theaters, Inc. asserts that it "is a body corporate of the state of Washington operating 35 mm. motion picture theaters in various counties in the State of Washington exhibiting adult film fare to the adult citizens of and/or visitors to the State of Washington." King County is not, however, specifically mentioned as one of these counties. The trial judge, after "being fully appraised of the parties' respective positions," ordered that Playtime "be granted leave to amend its complaint only to the extent necessary to join Norm Maleng . . . as an additional defendant." In light of our resolution of this case, we see no present need to decide this factual dispute.

quently, Washington state, county and city officials have not yet had the opportunity to enforce House Bill 626.[4] Plaintiffs' suits thus constitute facial challenges to a statute that has yet to be authoritatively interpreted or enforced.

The Supreme Court has consistently entertained facial challenges when first amendment rights have been at stake. As Justice Marshall recently emphasized, the Supreme Court has "repeatedly recognized that a statute which sweeps within its ambit a broad range of expression protected by the First Amendment should be struck down on its face." *United States v. Grace*, —— U.S. ——, ——, 103 S.Ct. 1702, 1712, 75 L.Ed.2d 736 (1983) (Marshall, J., concurring in part and dissenting in part) (footnote omitted). *See, e.g., United States v. Robel*, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 609-610, 87 S.Ct. 675, 687-688, 17 L.Ed.2d 629 (1967); *Elfbrandt v. Russell*, 384 U.S. 11, 19, 86 S.Ct. 1238, 1242, 16 L.Ed.2d 321 (1966); *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S.Ct. 1116, 1120, 14 L.Ed.2d 22 (1965); *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 60 S.Ct. 736, 741-742, 84 L.Ed. 1093 (1940); *Lovell v. Griffin*, 303 U.S. 444, 451, 58 S.Ct. 666, 668, 82 L.Ed. 949 (1938). Specifically, the Supreme Court has upheld such overbreadth challenges in cases involving the regulation of obscenity. *See, e.g., Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968); *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959).

[4] Were facial challenges not permitted, overbroad statutes would often restrict protected expression, even though they might ultimately be declared unconstitutional. To begin with, first amendment freedoms "are delicate and vulnerable," and the very "threat of sanctions may deter their exercise almost as potently as the actual

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[4] Under Section Three of the statute, enforcement proceedings may be initiated by the "prosecuting attorney for the county where the alleged moral nuisance is located," by the "city attorney for the city where the alleged moral nuisance is located," or by the state attorney general.

application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963). Unconstitutionally overbroad statutes can chill protected expression by causing "a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within [their] purview." *Thornhill v. Alabama*, 310 U.S. at 98, 60 S.Ct. at 742. Only by permitting facial attacks on such statutes can the unfettered exercise of first amendment freedoms be protected.

Second, facial challenges are necessary because the alternative of awaiting the outcome of individual prosecutions in state courts does not adequately protect first amendment freedoms. Aside from the enormously high costs and lengthy delays involved, *see, e.g., Zwickler v. Koota*, 389 U.S. 241, 252, 88 S.Ct. 391, 397, 19 L.Ed.2d 444 (1967); *Dombrowski v. Pfister*, 380 U.S. at 486-87, 490-91, 85 S.Ct. at 1120-21, 1122-23; *Baggett v. Bullitt*, 377 U.S. 360, 378-79, 84 S.Ct. 1316, 1326-27, 12 L.Ed.2d 377 (1964), a person thinking of engaging in protected behavior may be deterred from acting by the risk of conviction, even though his challenge to the law might eventually be upheld. Consequently, the chill on protected activity deters those whose legal challenges are necessary to narrow an overly broad statute. Absent facial challenges to overbreadth, then, "the contours of [a statute] would have to be hammered out case by case — and tested only by those hardy enough to risk criminal prosecution to determine the [statute's] proper scope." *Dombrowski v. Pfister*, 380 U.S. at 487, 85 S.Ct. at 1121.

The Supreme Court has indicated that there may sometimes be strong policy reasons against applying the overbreadth doctrine in a facial review of a statute's constitutionality. *See Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). A major exception to this approach, however, is in the area of first amendment rights. *See, e.g., Stoianoff v. Montana*, 695 F.2d 1214, 1218 (9th Cir.1983). In the case of an ordinary facial challenge to the overbreadth of a law, "a court's first task is to determine whether the enactment reaches a substantial amount

of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail." *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455, U.S. 489, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982) (footnote omitted). *See also Kolender v. Lawson*, —— U.S. ——, —— n. 8, 103 S.Ct. 1855, 1859 n. 8, 75 L.Ed.2d 903 (1983); *Stoianoff v. Montana*, 695, F.2d at 1218; *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943, 946 (11th Cir.), *cert. denied*, —— U.S. ——, 103 S.Ct. 132, 74 L.Ed.2d 113 (1982). The Supreme Court's decision in *Broadrick*, however, "implies that a finding of substantial overbreadth is necessary only when the challenged statute regulates conduct and not speech." *Turchick v. United States*, 561 F.2d 719, 722 (8th Cir.1977). In first amendment overbreadth cases, "a challenge to a statute regulating pure speech would succeed on a lesser showing of facial overbreadth." *Id.* at 722 n. 6.

[5] For these reasons, then, we do not hesitate to entertain plaintiffs' first amendment facial challenges to House Bill 626.[5]

ABSTENTION

[6] Defendants' general argument that federal courts should abstain from deciding the constitutionality of House Bill 626 until the Washington state courts first have an opportunity to construe its provisions was rejected by the district court. *Spokane Arcades, Inc. v. Eikenberry*, 544 F.Supp. at 1037. We will reverse the district court on the issue of abstention only when there has been an abuse of discretion. *See, e.g., Midkiff v. Tom*, 702 F.2d 788, 789 n. 1, 799 (9th Cir.1983); *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 819 (9th Cir.), *cert. denied*, 456 U.S. 1011, 102 S.Ct. 2308, 73 L.Ed.2d 1308 (1982); *Shamrock Dev. Co. v. City of Concord*, 656 F.2d 1380, 1385 (9th

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[5] In evaluating a facial challenge, we must also consider whether there are any readily apparent constructions capable of saving the statute, in a single state prosecution, from plaintiffs' constitutional challenges. We discuss this requirement later. *See infra*, 725 F.2d at pp. 488, 489.

Cir.1981). We find that the district court correctly held that abstention would be inappropriate.

We begin with the settled proposition that "a federal court must decide the cases properly before it; abstention from the exercise of jurisdiction is the exception to the rule." *Midkiff v. Tom*, 702 F.2d at 789 n. 1. *See also Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976); *Shamrock Dev. Co. v. City of Concord*, 656 F.2d at 1385. Indeed, constitutional challenges based on the first amendment right of free expression are the kind of cases that federal courts are particularly well-suited to hear. That is why abstention is generally inappropriate when first amendment rights are at stake. *See Spokane Arcades, Inc. v. Brockett*, 631 F.2d at 137. *See also Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980); *Zwicker v. Koota*, 389 U.S. at 252, 88 S.Ct. at 397.

[7] Nonetheless, defendants argue that abstention under the *Pullman* doctrine is appropriate in this case. *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 501, 61 S.Ct. 643, 645, 85 L.Ed. 971 (1941). Even a cursory analysis of the three *Pullman* factors, however, explains why *Pullman* abstention is rarely, if ever, appropriate in first amendment cases. To abstain under *Pullman*, a federal court must find that all three of the following factors are applicable: first, that the suit touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative for adjudication exists; second, that a definitive ruling on the state issue in question would end the controversy; and third, that the possibly determinative issue of state law is doubtful. *See, e.g., Midkiff v. Tom*, 702 F.2d at 789 n. 1; *Canton v. Spokane School District No. 81*, 498 F.2d 840, 845 (9th Cir.1974). *See also Colorado River Water Conservation District v. United States*, 424 U.S. at 814, 96 S.Ct. at 1244; *Knudsen Corp. v. Nevada State Dairy Commission*, 676 F.2d 374, 377 (9th Cir.1982). In first amendment cases, the first of these factors will almost never be present because the constitu-

tional guarantee of free expression is, quite properly, always an area of particular federal concern. *See, e.g., C-Y Development Co. v. City of Redlands,* 703 F.2d 375, 381 (9th Cir.1983) (citations omitted) ("[T]he Supreme Court has demonstrated a reluctance to order abstention in cases involving certain civil rights claims, such as voting rights, racial equality, and first amendments rights of expression."); *Jones v. Metzger,* 456 F.2d 854, 856 (6th Cir.1972) ("Even if a viable option were available to [plaintiffs] under state law, it is well-established . . . that when fundamental civil rights are at issue, federal courts should hesitate to abstain."); *Hobbs v. Thompson,* 448 F.2d 456, 463 (5th Cir.1971) ("[I]n a facial attack [on first amendment grounds] the special circumstances which have been held to justify abstention . . . are usually absent.").

Moreover, abstention by federal courts in first amendment cases could often result in the suppression of free speech that is meant to be protected by the Constitution. As the Supreme Court has emphasized, to abstain and thus "force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." *Zwickler v. Koota,* 389 U.S. at 252, 88 S.Ct. at 397-98. *See also Procunier v. Martinez,* 416 U.S. 396, 405, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224 (1974) ("[W]e are mindful of the high cost of abstention when the federal constitutional challenge concerns facial repugnance to the First Amendment."); *Garvin v. Rosenau,* 455 F.2d 233, 239 (6th Cir.1972) ("Further delay necessitated by abstention would be inconsistent with the policy of protecting the First Amendment against possible chilling influences.").

[8] Even if this were a case that did not involve first amendment rights, *Pullman* abstention would still be inappropriate. The second and third *Pullman* factors suggest that abstention is only proper when a federal constitutional issue may be avoided or presented differently once a state law issue is resolved or a state statute is construed. *See, e.g., Spokane Arcades, Inc. v. Brockett,*

631 F.2d at 137. In this case, we find that several key provisions of House Bill 626 are not susceptible to such saving constructions. Consequently, *Pullman* abstention would neither eliminate nor materially change the constitutional issues presented here. *See, e.g., Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 471, 481, 97 S.Ct. 1898, 1904, 52 L.Ed.2d 513 (1976); *Spokane Arcades, Inc. v. Brockett,* 631, F.2d at 137. In short, "the naked question, uncomplicated by an unresolved state law, is whether the [statute] on its face is unconstitutional." *Wisconsin v. Constantineau,* 400 U.S. 433, 439, 91 S.Ct. 507, 511, 27 L.Ed.2d 515 (1971). Abstention would not have been appropriate.

[9, 10] We therefore find that the district court did not abuse its discretion in deciding plaintiffs' claims on their merits.[6]

PLAINTIFFS' CONSTITUTIONAL CHALLENGES

I. *The Definition of Obscenity in House Bill 626 Uncon-*

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[6] None of the other traditional grounds for abstention is applicable in this case. Under the *Burford* doctrine, *Burford v. Sun Oil Co.,* 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), federal courts may decline to exercise jurisdiction when the case involves "an essentially local issue arising out of a complicated state regulatory scheme." *International Bhd. of Electrical Workers, Local Union No. 1245 v. Public Serv. Comm'n,* 614 F.2d 206, 211 (9th Cir.1980). We have traditionally applied the *Burford* doctrine to cases where suits involving the local issue have been concentrated in an individual state court and where the federal issues are inextricably bound up with state issues which state courts may be especially competent to deal with. *International Bhd.,* 614 F.2d at 211. Neither of these circumstances is likely to exist in a case involving a first amendment challenge to a state statute, and neither circumstance applies in this case.

Abstention may also be appropriate in certain instances when a federal suit seeks to enjoin a pending or ongoing state proceeding in which federal claims could be adjudicated competently. *See, e.g., Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); *Moore v. Sims,* 442 U.S. 415, 423, 425, 99 S.Ct. 2371, 2377, 2378, 60 L.Ed.2d 994 (1979); *L.H. v. Jamieson,* 643 F.2d 1351, 1352 (9th Cir.1981). It is not necessary to decide whether this is the type of case in which *Younger* abstention might otherwise be appropriate because, as the State notes, "[n]o one has been prosecuted [and] no civil actions have been filed" pursuant to House Bill 626. *See supra,* 725 F.2d at 487.

stitutionally Includes Protected First Amendment Expression.

A.

The judicial effort to find an acceptable definition for obscenity constitutes one of the longest and most arduous struggles in the history of American jurisprudence. After employing several different definitions, the Supreme Court finally adopted a three-part test in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). Under the *Miller* test, speech is obscene and thus not protected under the first amendment if three guidelines are satisfied:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

413 U.S. at 24, 93 S.Ct. at 2615 (citations omitted).

Despite the continued adherence to the *Miller* test, few would disagree with the view that only a "dim and uncertain line" separates obscenity from constitutionally protected speech. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66, 83 S.Ct. 631, 637, 9 L.Ed.2d 584 (1963). As Justices Brennan, Stewart and Marshall remarked, "one cannot say with certainty that material is obscene until at least five members of [the Supreme] Court, applying inevitably obscure standards, have pronounced it so." *Jenkins v. Georgia*, 418 U.S. 153, 164-65, 94 S.Ct. 2750, 2757, 41 L.Ed.2d 642 (1974) (Brennan, Stewart and Marshall, JJ., concurring), *quoting Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 92, 93 S.Ct. 2628, 2652, 37 L.Ed.2d 446 (1973) (Brennan, J., dissenting). Yet, on one side of the *Miller* line, speech is entitled to the highest form of protection afforded by our laws and constitution, while, on the other side, speech that is held obscene may be punished as a crime.

[11] Because of the inevitable uncertainty as to where the line will be drawn and the critical importance of not interfering with constitutionally protected speech, courts have insisted that the *Miller* guidelines be followed without deviation. *See, e.g., Hamling v. United States*, 418 U.S. 87, 114, 94 S.Ct. 2887, 2906, 41 L.Ed.2d 590 (1974) ("*Miller* . . . was speaking in terms of substantive constitutional law of the First and Fourteenth Amendments . . . [and establishes] a limit beyond which neither legislative draftsmen nor juries may go. . . ."). [7] When the *Miller* guidelines were adopted, the Supreme Court emphasized that "[s]tate statutes designed to regulate obscenity must be *carefully limited*. As a result, we now *confine the permissible scope* of such regulation to works" that satisfy the three-part test. *Miller*, 413 U.S. at 23-24, 93 S.Ct. at 2614 (emphasis added, citation omitted). To assure that protected speech is not impermissibly regulated, then, even subtle deviations from the *Miller* standards must be carefully examined.

[12] The first requirement under *Miller* is that the average person, applying contemporary community standards, would find "that the work, taken as a whole, appeals to the prurient interest." *Miller*, 413 U.S. at 24, 93 S.Ct. at 2615. Section 1(2)(a) of the Washington anti-obscenity law tracks the *Miller* prurient interest requirement almost exactly. Section 1(8), however, defines "prurient" as "that which incites lasciviousness or lust." Plaintiffs contend that the inclusion of "lust" in the definition of "prurient" impermissibly expands the boundaries of the *Miller* guide-

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[7] *See also Leech v. American Booksellers Ass'n, Inc.*, 582 S.W.2d 738, 745 (Tenn.1979) (a court "cannot give constitutional approval to any law expanding the standards for adjudicating obscenity, *vel non*, beyond the dictates of *Miller* and its progeny."); *State v. Princess Cinema of Milwaukee*, 96 Wis.2d 646, 292 N.W.2d 807, 808, 811 (1980) (it was error for a court to "deviate[] from the *Miller v. California* standards."); *D & J Enterprises, Inc. v. Michaelson*, 401 A.2d 440, 442, 446 (R.I.1979) ("[T]he *Miller* Court set out a new framework of revised standards to guide the states in separating what is obscene . . . . from what is not obscene . . . [Because t]he act fails to meet the *Miller* blueprint, [it] must be stricken as constitutionally overbroad.").

lines and renders House Bill 626 unconstitutional. We agree.

The Supreme Court first attempted to define "prurient" in a footnote in *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). The Court began by noting that "material having a tendency to excite lustful thoughts" was an example of material "appealing to prurient interest." *Roth*, 354 U.S. at 487 n. 20, 487, 77 S.Ct. at 1310 n. 20, 1310. Next the Court referred to the Webster's New International Dictionary (Unabridged, 2d ed., 1949), which defined "prurient" as "[i]tching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd. . . ." Ultimately, however, the Court concluded its analysis by stating that there was "no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I., Model Penal Code, § 207.10(2) (Tent. Draft No. 6, 1957)." *Roth*, 354 U.S. at 487 n. 20, 77 S.Ct. at 1310 n. 20. That section of the A.L.I.'s Model Penal Code defined an item as obscene "if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion. . . ."

Both the district court and defendants contend that *Roth's* definition of "prurient interest" included the concept of "lust." *See, e.g., Spokane Arcades, Inc. v. Eikenberry*, 544 F.Supp. at 1038 ("*Roth* in actuality settled upon a shortened definition [of prurient interest], *i.e.*, 'material having a tendency to incite lustful thoughts.' "). Although there may be some initial appeal to this argument, we note that the discussion in *Roth* actually *concluded* with the A.L.I. Model Penal Code definition — one that defined a "prurient interest" as "shameful or morbid" and that did not include "lust" either expressly or within the meaning of the words used in the definition. *See, e.g., Goldstein v. Allain*, 568 F.Supp. 1377 (N.D. Miss.1983) ("*Roth* and *Miller* attributed to the term 'prurient interest' a specific judicial meaning — that of a shameful and morbid interest in nudity, sex, or excretion.").

While we do not believe the Supreme Court intended in *Roth* to equate "lust" with "prurient interest," we also recognize that the meaning of words changes as a result of contemporary usage. Obscenity jurisprudence — based as it has been on contemporary community standards and changing social mores — is an extremely fluid area of law. *See, e.g., Red Bluff Drive-In, Inc. v. Vance,* 648 F.2d 1020, 1029 n. 7 (5th Cir.1981), *cert. denied,* 455 U.S. 913, 102 S.Ct. 1264, 71 L.Ed.2d 453 (1982). The connotations that accompanied the word "lust" in 1957 when *Roth* was decided, are not necessarily the same ones that attach to the word today. For example, the most recent edition of Webster's New International Dictionary (Unabridged, 3d ed., 1976) no longer includes the word "lust" in its definition of "prurient." Indeed, the word has acquired such acceptable connotations that, prior to this election in 1976, presidential candidate Jimmy Carter confessed in a popular national publication that he had "looked on a lot of women with lust [and] . . . committed adultery in my heart many times." "Playboy Interview: Jimmy Carter," "*Playboy,* Nov. 1976, at 86. We do not think that President Carter was describing a shameful or morbid interest; rather, he was obviously expressing a healthy, wholesome, human reaction common to millions of well-adjusted persons in our society. Certainly, we think it clear that is how the country understood his remark, and how the term "lust" is generally perceived today.

Court decisions since *Roth* have implicitly recognized the changing meanings of the words used to define obscenity. The *Miller* decision, which supplies the Supreme Court's most recent definition of obscenity, has replaced the definitions offered in *Roth.* In *Miller,* the Supreme Court makes no reference to the term "lust." To the contrary, the *Miller* Court refers *solely* to the definition of obscenity offered in the A.L.I.'s 1962 Official Draft of the Model Penal Code. 413 U.S. 18 n. 2, 93 S.Ct. at 2612 n. 2. The section of the Code cited by the Court defines "prurient interest" as "a shameful or morbid interest in nudity, sex or excretion." A.L.I. Model Penal Code § 251.4(1) "Ob-

scene Defined." (Official Draft 1962). Other courts that have considered the issue have followed the Supreme Court's instructions in *Miller* and defined "prurient interest" as "shameful or morbid" and not as "lustful." *See, e.g., Red Bluff Drive-In, Inc. v. Vance,* 648 F.2d at 1026,[8] *United States v. 35 MM. Motion Picture Film Entitled "Language of Love,"* 432 F.2d 705, 711 (2d Cir.1970), *cert. denied,* 403 U.S. 925, 91 S.Ct. 2241, 29 L.Ed.2d 704 (1971); *Goldstein v. Allain,* 568 F.Supp. 1377 (N.D.Miss., 1983); *Leech v. American Booksellers Association, Inc.,* 582 S.W.2d 738, 749-50 (Tenn. 1979).

We agree with these decisions and reaffirm that, under the first prong of the *Miller* test, a "prurient interest" is "a shameful or morbid interest in nudity, sex or excretion." By including "lust" in its definition of "prurient," the Washington state legislature has clearly exceeded the established — though sometimes blurred — boundaries drawn by the Supreme Court to distinguish protected first amendment expression from that which is obscene.

[13] Indeed, to permit expression that merely excites "lust" to be regulated by the state would destroy the boundaries between protected and unprotected speech. To the contemporary jury, "lust" is unlikely to connote anything more than "sexual desire." *Webster's Third New International Dictionary* (Unabridged, 3d ed., 1976); *see also The Random House Dictionary of the English Lan-*

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[8] In *Red Bluff,* the Fifth Circuit held that "the lack of a definition for the term 'prurient interest' does not render the [Texas obscenity] statute constitutionally deficient." 648 F.2d at 1026. Defendants argue that *Red bluff* is dispositive here. We disagree. *Red Bluff* involved a statute that recited, "with little variation, the familiar three-part *Miller* test" for obscenity. 648 F.2d at 1026. The statute included the term "prurient interest," although no definition was offered. The Fifth Circuit found that a specific provision in Texas law required courts construing the term "to apply any 'technical or particular meaning' the term has acquired from prior judicial review." 648 F.2d at 1026 (citations omitted). Thus, *Red Bluff* involved a statute that adopted the *Miller* test exactly but contained *no definition whatsoever* of "prurient interest;" the proper and constitutional definition was supplied by operation of law. In the case before us, House Bill 626 contains a very explicit definition of "prurient" — one that expressly incorporates an overbroad and unconstitutional definition of that term.

guage (Unabridged, 1979) ("lust" defined as "sexual desire or appetite"). *See, e.g., Goldstein v. Allain,* 568 F.Supp. 1377, at 1385 (N.D.Miss.1983) ("The inclusion of the terms lustful and erotic [in the Mississippi anti-obscenity statute's definition of prurient interest] would permit the application of the statute to arguably protected materials. Such an intrusion into the area of protected speech is impermissible."). Expression that may merely stimulate sexual longing or desire is entitled to the full range of first amendment protections and cannot constitutionally be branded as obscene.[9]

We agree with the Second Circuit's conclusion "that the Supreme Court has never intended to brand as 'obscene' representations of sexual matters which do not import a debasing, 'shameful or morbid' quality into the expression or depiction of human sexuality. To conclude otherwise would be to suggest that the human body and its functions are in themselves somehow 'dirty' or unspeakably offensive." *United States v. 35 MM. Motion Picture Film Entitled "Language of Love,"* 432 F.2d at 711.[10] Such an argument is degrading, and, like the Second Circuit, we reject it. In fact, if the arousal of good, old-fashioned, healthy lust "is equated with an appeal to 'prurient interest,' it might be necessary to hale into court our leading couturiers, perfumers and manufacturers of soft drinks, soap suds and automobiles," 432 F.2d at 712, as well as

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[9] The dissent's reliance on the Supreme Court's order of dismissal in *Art Theatre Guild, Inc. v. Ewing,* 421 U.S. 923, 95 S.Ct. 1649, 44 L.Ed.2d 82 (1975) is misplaced. A review of the papers submitted to the Court by the parties reveals that neither the appellant nor the appellee even mentioned the Ohio statute's inclusion of the term "lust." Similarly, there is no indication in the Ohio Supreme Court's opinion in the underlying case that the "lust" issue was ever raised before that court. *State v. A Motion Picture Film Entitled "Without a Stitch,"* 37 Ohio St.2d 95, 307 N.E.2d 911 (1974).

[10] This Second Circuit decision involved an obscenity challenge to a motion picture called "Language of Love." Even though "[t]o the average person . . . certain scenes in 'Language of Love' may present a temporary erotic appeal, and the effect may be temporary sexual arousal," 432 F.2d at 711-12, the Second Circuit found that the film did not appeal to the prurient interest and thus was not obscene.

mainstream stage, movie and television producers, directors and performers. Only by distinguishing between "the arousal of sexual instincts and the perversion of those instincts to morbidity," 432 F.2d at 712, can we ever hope to safeguard from state intrusion the already "dim and uncertain" boundary surrounding protected first amendment expression.

B.

As in all cases, involving facial constitutional challenges to state statutes that have not yet been enforced or authoritatively interpreted, we must consider possibility of a "readily apparent construction [by a state court] . . . as a vehicle for rehabilitating the statute[] in a single prosecution." *Dombrowski v. Pfister*, 380 U.S. at 491, 85 S.Ct. at 1123. *See also Zwickler v. Koota*, 389 U.S. at 251 n. 14, 88 S.Ct. at 397 n. 14 ("the state statute" must be "obviously susceptible of a limiting construction"); *Harrison v. NAACP*, 360 U.S. 167, 177, 79 S.Ct. 1025, 1030, 3 L.Ed.2d 1152 (1959); *Stoianoff v. Montana*, 695 F.2d at 1218. If it were obvious from a reading of the statute that a state court could in a single prosecution properly construe the statute in a manner that would render it constitutional, our decision on plaintiffs' constitutional challenges would be "render[ed] unnecessary," *Zwickler v. Koota*, 389 U.S. at 250, 88 S.Ct. at 397, and we would dismiss plaintiffs' challenges. *Broadrick*, 413 U.S. at 603, 617, 93 S.Ct. at 2911, 2918.

In this case, we find it crystal clear that the term "prurient," as used in House Bill 626, includes "lust." It is not possible, under the statute, to give the term a contrary meaning. The statute expressly incorporates the term "lust" in its definition of "prurient."[11] Consequently, a

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[11] The district court agreed with defendants' argument that § 1(8) of House Bill 626 defines only the word "prurient" and not the term "prurient interest." Consequently, defendants contend that § 1(2) — which incorporates the *Miller* test, including the term "prurient interest" — can be read independently of the definition of "prurient" in § 1(8). *See, e.g., Spokane Arcades, Inc. v. Eikenberry*, 544 F.Supp. at 1038-39. If this is the case, defendants argue, the term "prurient inter-

state court would either have to ignore the statutory definition completely or rewrite the statute in order to narrow its unconstitutional scope.

Since the state statute is not obviously susceptible to an interpretation that will avoid the federal constitutional issued raised by plaintiffs, it is our duty to decide the constitutional question presented. *See, e.g., Zwickler v. Koota,* 389 U.S. at 250-51, 88 S.Ct. at 396-97. *See also Aptheker v. Sec'y of State,* 378 U.S. 500, 515, 84 S.Ct. 1659, 1668, 12 L.Ed.2d 992 (1964) (statute held invalid because "[t]he clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting."); *Red Bluff Drive-In, Inc. v. Vance,* 648 F.2d at 1029 ("If on its face the statute warned too broadly, deference to the state courts would be inappropriate."); *Turchick v. United States,* 561 F.2d at 724 ("we need not rely on . . . a saving construction because we believe the language of the statute is clear."). *Cf. Kunz v. New York,* 340 U.S. 290, 304, 71 S.Ct. 312, 320, 95 L.Ed. 280 (1951) (Jackson, J., dissenting) ("It may happen that a statute will disclose by its very

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est" can be given its recognized judicial meaning and the word "lust" in § 1(8) can be ignored.

We find this interpretation of House Bill 626 to be completely implausible. To begin with, the word "prurient" is only twice in the statute: in § 1(8), where it is defined, and in § 1(2)(a), where it is part of the phrase "prurient interest." It would have made no sense for the framers of House Bill 626 to define "prurient" and then never to use the word in the statute. Thus, the only reasonable conclusion is that the definition of "prurient" in § 1(8) is intended to refer to the use of that word the only other time it appears in the statute, in § 1(2)(a). This is also the only conclusion that avoids the untenable result of rendering a portion of the statute — the definition of "prurient" in § 1(8) — completely irrelevant and superfluous.

In addition, the introduction to § 1 of House Bill 626 explicitly commands that "[t]he definitions set forth in this section shall apply throughout" the entire statute. It makes little sense to argue, then, that a definition of a word provided in § 1(8) does not apply when the same word is used in § 1(2)(a). In fact, the other definitions offered in § 1(3) & (4) also refer to words used in the statute's definition of obscenity in § 1(2). We thus reject as utterly without merit defendants' alternative reading of House Bill 626.

language that it is impossible of construction in a manner consistent with First Amendment rights.").

C.

[14] Because the definition of obscenity in Washington's anti-obscenity statute unconstitutionally infringes on protected expression, the entire statute must be declared invalid. The application of both civil and criminal penalties under House Bill 626 depends upon a determination that the materials involved are legally obscene. Consequently, an unconstitutionally overbroad definition of obscenity renders House Bill 626 null and void.

II. *The Civil Fine Provisions of House Bill 626 Unconstitutionally Restrict Protected First Amendment Expression.*

In view of the State of Washington's previous attempts to deal with obscenity and the fact that the legislature will undoubtedly try again, we believe it advisable to consider one of the other principal aspects of House Bill 626 challenged in these cases: the statute's civil fine provision. We consider this provision because it contains an obviously unconstitutional feature.[12]

The civil penalty provision of House Bill 626 is set forth in section 4(2). Once it has been determined "that a defendant has with knowledge maintained a moral nuisance, the court shall impose a civil penalty and judgment of an amount as the court may determine to be appropri-

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[12] Our discussion of one aspect of the civil fine provision, and our failure to discuss other important issues, should not be read as intimating any view on the remaining constitutional challenges raised by plaintiffs. We do not here consider plaintiffs' other complaints regarding the dual civil-criminal fine system. In particular, we express no opinion on plaintiffs' other first amendment and eighth amendment challenges to the statute's civil and criminal penalty provisions. Nor do we indicate any view on the district court's two-fold decision that (a) the Constitution requires a jury trial in obscenity cases when civil fines are imposed, and (b) the federal courts need not now determine whether persons against whom such fines are sought would be afforded the right to a jury under Washington law. *See Spokane Arcades, Inc. v. Eikenberry*, 544 F.Supp. at 1042-43.

ate. In imposing the civil penalty, the court shall consider the wilfullness of the defendant's conduct and the profits made by the defendant attributable to the moral nuisance." Unlike the general nuisance statute, *Wash. Rev.Code Ann.*, § 7.48.250 (1961, 1983 Supp.), there is no limit in House Bill 626 on the amount of the civil fine that may be assessed.

Plaintiffs challenge the civil penalty provision on a variety of grounds. The one we consider here relates to the requirement that a court must take into account "the profits made by the defendant attributable to the moral nuisance" when setting the amount of the civil fine. The statute defines a "moral nuisance," in three of four instances, as a "place" where obscene materials or behavior may be found.[13] Thus, the civil fine, which is premised in part on profits "attributable to the moral nuisance," may be based on profits from the *sale of protected materials* in a place that is a moral nuisance solely because obscene materials were also sold or exhibited there. For example, the statute would allow a theater owner who sold $1,000,000 worth of admissions to constitutionally protected films and $100,000 worth of admissions to films judged legally obscene[14] to be fined on the basis of admissions to all of the films shown. Moreover, the amount of

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[13] According to Section Two of the statute, [t]he following are declared to be moral nuisances;

(1) *Any and every place* in the state where lewd films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition;

(2) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a moral nuisance under this section;

(3) *Any and every place* of business in the state in which lewd publications constitute a principal part of the stock in trade;

(4) *Every place* which, as a regular course of business, is used for the purpose of lewdness or prostitution, and every such place in or upon which acts of lewdness or prostitution are conducted, permitted, carried on, continued, or exist.

(Emphasis added).

[14] To qualify as a moral nuisance under Section Two, a theater must "publicly exhibit" obscene films "as a regular course of business" or possess such films for this purpose.

profits from the operation of the entire business is one of only two factors that a judge *must* consider when setting a civil fine.

[15] The procedure for determining civil fines set forth in House Bill 626 is, in our view, unconstitutional. We hold that it is impermissible, in an anti-obscenity statute, to provide that the amount of a fine shall be based, even in part, on the proceeds from constitutionally protected material.

We do not question the State of Washington's right to regulate certain nuisances within its boundaries; what we are concerned with is "the consequences for constitutionally protected speech" in the State's efforts. *Marcus v. A Search Warrant of Property*, 367 U.S. 717, 731, 81 S.Ct. 1708, 1716, 6 L.Ed.2d 1127 (1961). Consequently, we apply the familiar requirement that statutes punishing expressive conduct "must be carefully drawn . . . to punish only unprotected speech and not be susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 522, 92 S.Ct. 1103, 1106, 31 L.Ed.2d 408 (1972). The civil fine provision of House Bill 626 does not satisfy this requirement.

Far from being narrowly tailored to the achievement of a permissible state goal, the civil fine provision "sweep[s] unnecessarily broadly and thereby invade[s] the area of protected freedoms." *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307, 84 S.Ct. 1302, 1314, 12 L.Ed.2d 325 (1964). By focusing on the place where the obscene materials are sold or exhibited rather than the unprotected materials themselves, the civil fine provision endangers protected speech. Courts that have addressed similar issues have held that abatement of a moral nuisance "must be directed to the particular books or films which have been adjudged obscene following a fair and full adversary hearing rather than against the premises in which the material is sold, exhibited, or displayed." *People ex rel. Busch v. Projection Room Theater*, 17 Cal.3d 42, 56, 130 Cal.Rptr. 328, 338, 550 P.2d 600, 610, *cert. denied*, 429 U.S. 922, 97 S.Ct. 320, 50 L.Ed.2d 289 (1976). A contrary

result would allow the government to punish protected first amendment expression simply because obscene speech was also disseminated from the same place.

In fact, the civil fine provision of House Bill 626 is similar in one important respect to the so-called anti-obscenity "padlocking statutes." These padlocking statutes typically provide for the closure of a place of business after a judicial determination that obscene materials have been disseminated from that location. They have consistently been declared unconstitutional because they constitute impermissible prior restraints on free expression. *See, e.g., Universal Amusement Co., Inc. v. Vance,* 587 F.2d 159, 164-66 (5th Cir.1978) (en banc), and cases cited therein, *aff'd,* 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980); *People ex rel. Busch v. Projection Room Theater,* 17 Cal.3d at 42, 130 Cal.Rptr. 328, 550 P.2d 600; *General Corp. v. State ex rel. Sweeton,* 294 Ala. 657, 320 So.2d 668 (1975), *cert. denied,* 425 U.S. 904, 96 S.Ct. 1494, 47 L.Ed.2d 753 (1976); *Sanders v. State,* 231 Ga. 608, 203 S.E.2d 153 (1974); *Gulf States Theaters of Louisiana, Inc. v. Richardson,* 287 So.2d 480 (La.1973); *State ex rel. Andrews v. Chateau X, Inc.* 296 N.C. 251, 250 S.E.2d 603 (1979), *vacated on other grounds,* 445 U.S. 947, 100 S.Ct. 1593, 63 L.Ed.2d 782 (1980); *Mitchem v. State ex rel. Schaub,* 250 So.2d 883 (Fla.1971); *New Riviera Arts Theatre v. State ex rel. Davis,* 219 Tenn. 652, 412 S.W.2d 890 (1967); *State v. A Motion Picture Entitled "The Bet,"* 219 Kan. 64, 547 P.2d 760 (1976). Of course, the familiar presumption against prior restraints constitutes the principal rationale for these decisions. *See, e.g., Near v. Minnesota,* 283 U.S. 697, 711-15, 51 S.Ct. 625, 629-30, 75 L.Ed. 1357 (1931); *Bantam Books, Inc. v. Sullivan,* 372 U.S. at 70-71, 83 S.CT. at 639-640. We also think it crucial, however, that the padlocking statutes have the effect of preventing the dissemination of protected speech simply because obscene speech originated from the same location. In our view, the civil fine provision of House Bill 626 — which prescribes punishment based on the profits from protected materials that were sold or exhibited in the same place as obscene

materials — is no less objectionable. It may be argued that the protected speech is not being punished but that it only serves as a measure of the appropriate punishment. Such an argument is not persuasive. The crucial point is that free speech is far too sensitive a subject matter to serve as the measurement for civil or criminal penalties.

Moreover, it appears that the civil fine provision of House Bill 626 treats businesses disseminating both protected and unprotected speech differently from the way other businesses are treated under other statutes imposing civil fines. Defendants do not point to any other Washington State statutes that base the amounts of fines on the profits from an entire business when only a part of that business is unlawful. Although we have not conducted an independent analysis of the entire body of Washington law, our sampling of various civil fine provisions has revealed no provision similar to that contained in House Bill 626. To the contrary, the statutes we have examined, including Washington's general nuisance statute. *Wash.Rev.Code Ann.*, § 7.48.250 (1961; 1983 Supp.), merely establish the minimum and maximum amounts of civil penalties.

Differential treatment of first amendment activity with respect to the imposition of fines is prohibited by the Constitution. In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, —— U.S. ——, 103 S.Ct. 1365, 1375, 75 L.Ed.2d 295 (1983) the Supreme Court struck down a state use tax that provided for differential treatment of the press. As the Court emphasized, "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Id.* at 1372. The Court's reasoning is as applicable to fines as taxes.

The basing of fines on profits from the sale or exhibition of constitutionally protected materials is unnecessary to the achievement of any legitimate state goal. Thus, the presumption of unconstitutionality cannot be rebutted here. *See, e.g., Minneapolis Star & Tribune Co.*, 103 S.Ct.

at 1372 (differential taxation of first amendment businesses is unconstitutional "unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation."). In support of our conclusion, we note that in the criminal penalty provision of House Bill 626, the Washington legislature authorized monetary sanctions based *solely* on profits from the sale of constitutionally unprotected materials. The criminal penalty provision requires the court to consider "the profits made by the defendant attributable to the felony," with the felony defined as the promotion of pornography. It is therefore evident that in enacting the civil fine provision, the State of Washington could have achieved its legislative goals by more carefully tailored means that would be less restrictive of free expression. *See, e.g., Shelton v. Tucker,* 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960).

We do not see any readily apparent construction that could save the civil fine provision. *See supra,* 725 F.2d at 494. As with the statute's definition of "prurient," state courts would have to ignore or rewrite the explicit language of the provision in order to salvage House Bill 626. Consequently, we find that the civil fines section of the Washington anti-obscenity law is unconstitutional.

CONCLUSION

The Washington state anti-obscenity statute adopts an unconstitutionally broad definition of obscenity. We must therefore hold the statute unconstitutional. We also hold that the statute's civil fines provision impermissibly restricts protected speech.

REVERSED.

APPENDIX

House Bill 626 provides, in relevant part:

Section 1. The definitions set forth in this section shall apply throughout this chapter.

(1) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of

the patently offensive sexual or violent conduct which appears in the lewd matter, or knowledge of the acts of lewdness or prostitution which occur on the premises.

(2) "Lewd matter" is synonymous with "obscene matter" and means any matter:

(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which explicitly depicts or describes patently offensive representations or descriptions of;

(i) Ultimate sexual acts, normal or perverted, actual or simulated; or

(ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or

(iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

(c) Which, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value.

(3) "Lewdness" shall have and include all those meanings which are assigned to it under the common law.

(4) "Matter" shall mean a motion picture film or a publication or both.

(5) "Motion picture film" shall include any:

(a) Film or plate negative;

(b) Film or plate positive;

(c) Film designed to be projected on a screen for exhibition;

(d) Film, glass slides, or transparencies, either in negative or positive form, designed for exhibition by projection on a screen;

(e) Video tape or any other medium used to electronically reproduce images on a screen.

(6) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(7) "Place" includes, but is not limited to, any building, structure, or places, or any separate part or portion

thereof, whether permanent or not, or the ground itself.

(8) "Prurient" means that which incites lasciviousness or lust.

(9) "Publication" shall include any book, magazine, article, pamphlet, writing, printing, illustration, picture, sound recording, or coin-operated machine.

(10) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer of possession of, lewd matter.

Section 2. The following are declared to be moral issues.

(1) Any and every place in the state where lewd films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition;

(2) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a moral nuisance under this section;

(3) Any and every place of business in the state in which lewd publications constitute a principal part of the stock in trade;

(4) Every place which, as a regular course of business, is used for the purpose of lewdness or prostitution, and every such place in or upon which acts of lewdness or prostitution are conducted, permitted, carried on, continued, or exist.

Section 3. Any of the following parties may bring a civil action in the superior court of any county where a moral nuisance is alleged to have been maintained:

(1) The prosecuting attorney for the county where the alleged moral nuisance is located;

(2) The city attorney for the city where the alleged moral nuisance is located; or

(3) The attorney general.

The rules of evidence, burden of proof, and all other rules of court shall be the court rules generally applicable to civil cases in this state: PROVIDED, That the standard of

proof on the issue of obscenity shall be clear, cogent, and convincing evidence.

Section 4. (1) No person shall with knowledge maintain a moral nuisance.

(2) Upon a determination that a defendant has with knowledge maintained a moral nuisance, the court shall impose a civil penalty and judgment of an amount as the court may determine to be appropriate. In imposing the civil penalty, the court shall consider the wilfulness of the defendant's conduct and the profits made by the defendant attributable to the moral nuisance.

Section 5. All civil penalties assessed under section 4 of this act shall be paid into the general treasury of the governmental unit commencing the civil action.

Section 6. Nothing in this chapter applies to the circulation of any material by any recognized historical society or museum, any library of any college or university, or to any archive or library under the supervision and control of the state, county, municipality, or other political subdivision.

Section 7. Sections 1 through 6 of this act shall constitute a new chapter in Title 7 RCW.

Section 8. There is added to chapter 9.68 RCW a new section to read as follows:

A person who, for profit-making purposes and with knowledge, sells, exhibits, displays, or produces any lewd matter as defined in section 1 of this act is guilty of promoting pornography. Promoting pornography is a class C felony and shall bear the punishment prescribed for that class of felony, except that upon conviction of promoting pornography the court shall impose a fine of not less than five thousand dollars per count nor more than fifty thousand dollars per count. In imposing the criminal penalty, the court shall consider the wilfulness of the defendant's conduct and the profits made by the defendant attributable to the felony. All fines assessed under this chapter shall be paid into the general treasury of the state.

Section 9. If any provision of this act or its application to any person or circumstance is held invalid, the re-

mainder of the act or the application of the provision to other persons or circumstances is not affected.

Section 10. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

WALLACE, Circuit Judge, dissenting:

Rejecting prudential approaches that would allow us to await application of this statute to a concrete factual situation, the majority finds House Bill 626 unconstitutionally overbroad on its face because its drafters, following the Supreme Court's language in *Roth v. United States*, 354 U.S. 476, 486, 487 n. 20, 77 S.Ct. 1304, 1310 n. 20, 1 L.Ed.2d 1498 (1957) (*Roth*), used the word "lust" to help define prurient interest. The majority concludes that "[t]he application of both civil and criminal penalties under House Bill 626 depends on a determination that the materials involved are legally obscene. Consequently, an unconstitutionally overbroad definition of obscenity renders House Bill 626 null and void." Despite having done all it may do as a court, however, the majority goes on to assert that "because the legislature will undoubtedly try again, we believe it advisable to discuss . . . the statute's civil fine provision . . . . because it contains an obviously unconstitutional feature."

What follows that statement is merely advisory. Were it a holding, I would concur: the civil fine provision is overbroad and incapable of a saving construction. Even the majority's prior restraint argument would have force on this issue. *See, e.g.*, Jeffries, *Rethinking Prior Restraint*, 92 Yale L.J. 409, 412 (1983); *see generally Vance v. Universal Amusement Co.*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980). But neither this advice to the state legislature, nor the discussion of it, amounts to an alternative holding. The actual holding of the majority strikes down the whole House Bill 626. The majority's dicta would not reach a similar conclusion; instead, it would strike down only a portion of the statutory scheme, leaving the rest intact. In that sense it is not an alternative way of

reaching a result, but an answer to a different, and lesser, question. An outcome-determinative test shows the majority's conclusion about the unconstitutionality of the civil fines cannot be a true alternative holding. Had the majority correctly decided that the mere use of "lust" is not facially overbroad, the remaining "alternative holding" would not allow the appeal to come out the same way on the validity of the statute as a whole. *See* Lucas, *The Direct and Collateral Estoppel Effects of Alternative Holdings,* 50 U.Chi.L.Rev. 701, 703 (1983). Because the civil fine discussion is dictum, I do not vote upon it. I do dissent, however, from the part of the majority opinion that is a holding.

The current limits on obscenity legislation, state or federal, appear generally in *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) (*Miller*). That case did not reject all that had gone before, or limit scripturally all that would come after. *See, e.g., id.* at 24 n. 6, 93 S.Ct. at 2615 n. 6. In explaining the term "obscene material," *Miller* affirmed that the words "have a specific judicial meaning which derives from the *Roth* case, *i.e.,* obscene material 'which deals with sex.' *Roth, supra,* [354 U.S.] at 487 [77 S.Ct. at 1310]. See also ALI Model Penal Code § 251.4(1) 'Obscene Defined.' (Official Draft 1962)." *Miller,* 413 U.S. at 18 n. 2, 93 S.Ct. at 2612 n. 2. The Court's opinion, *id.* at 24, 93 S.Ct. at 2614, also looked back to *Roth* for help in defining the permissible scope for state regulation of obscene material: "whether 'the average person, applying contemporary community standards,' would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin, supra* [408 U.S. 229], at 230 [92 S.Ct. 2245, at 2246, 33 L.Ed.2d 312], quoting *Roth v. United States, supra,* [354 U.S.], at 489 [77 S.Ct. at 1311]."

In reaffirming that the first amendment does not protect obscene material, *Miller* clearly indicates that *Roth* provides the chief source for understanding "prurient interest." Only in *Roth,* and in no other opinion, did the Court explain the term:

> Obscene material is material which deals with sex in a manner appealing to prurient interest.[20]

354 U.S. at 487 & n. 20, 77 S.Ct. at 1310 & n. 20 (emphasis added).

It is thus clear in *Roth*, unchanged by *Miller*, that "lustful thoughts" can be a part of the "prurient interest" definition. The majority would eliminate that part of *Roth* in order to arrive at its conclusion that the State of Washington may not constitutionally include "lust" as even a part of its definition.

First, the majority argues that the direct citation to "lustful thoughts" means nothing because the *Roth* footnote ends by citing the Model Penal Code. But why? Would not the reverse of this argument make as much sense: because the Court begins by citing "lustful thoughts," the rest of the footnote means nothing?

The better interpretation is to read the footnote as a whole. Indeed, as the Court's reference in the footnote to "no significant difference in meaning" hints, the footnote catalogues different ways to describe the same concept. The reference to lust describes prurient interest as much as does the reference to the Model Penal Code. *See, e.g.*,

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[20] *I.e., material having a tendency to excite lustful thoughts.* Webster's New International Dictionary (Unabridged, 2d ed., 1949) defines *prurient*, in pertinent part, as follows:

". . . Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd. . . ."

Pruriency is defined, in pertinent part, as follows:

". . . Quality of being prurient; lascivious desire or thought. . . ." See also *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230, 242, 35 S.Ct. 387, 390, 59 L.Ed. 552, where this Court said as to motion pictures: ". . . They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a *prurient interest may be excited and appealed to.* . . ." (Emphasis added.)

We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I., Model Penal Code, § 207.10(2) (Tent. Draft No. 6, 1957), *viz:*

". . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . ." See Comment, *id.*, at 10, and the discussion at page 29 *et seq.*

Feinberg, *Pornography and the Criminal Law*, 40 U.Pitt.L.Rev. 567, 585 (1979) (interpreting obscenity in *Roth* with reference to the "appeal to prurient interest" clause: obscenity means "whatever is produced for the sole purpose of arousing lustful thoughts . . . .").

No doubt the Supreme Court has often addressed the Model Penal Code's definition of prurient interest because states have often enacted it. *See, e.g., Ward v. Illinois*, 431 U.S. 767, 771, 97 S.Ct. 2085, 2088, 52 L.Ed.2d 738 (1977) (Ill.Rev.Stat. c. 38, § 11-20(b)); *S.S. & W., Inc. v. Kansas City*, 421 U.S. 925, 95 S.Ct. 1650, 44 L.Ed.2d 83 (1975) (Kansas City Ord. § 26.141) (Brennan, J., dissenting form dismissal of the appeal for want of a substantial federal question); *Jenkins v. Georgia*, 418 U.S. 153, 154-55, 94 S.Ct. 2750, 2752, 41 L.Ed.2d 642 (1974) (Ga.Code Ann. § 26-2101); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 51 n. 1, 93 S.Ct. 2628, 2632 n. 1, 37 L.Ed.2d 446 (1973) (Ga.Code Ann. § 26-2101); *Miller*, 413 U.S. at 16 n. 1, 93 S.Ct. at 2611 n. 1 (Cal.Penal Code § 311.2(a)). That does not mean the Court has abandoned *Miller's* adoption of the *Roth* definition. The Supreme Court has never held that the Model Penal Code provides the only acceptable definition. States may choose other ways to define appeals to the prurient interest. *Cf. Smith v. United States*, 431 U.S. 291, 310, 97 S.Ct. 1756, 1769, 52 L.Ed.2d 324 (1977) (Powell, J., concurring) (states have power to design their obscenity statutes as they see fit; "Within the boundaries staked out by *Miller*, the states retain broad latitude . . . ."). Indeed, that is what has occurred.

In accepting this latitude to define, some states have not followed the Model Penal Code but have, as identified in *Miller* itself, 413 U.S. at 24 & n. 6, 93 S.Ct. at 2615 & n. 6, listed particular depictions of physical conduct. *See, e.g., id.* (1971 Ore.Laws, c. 743, art. 29, §§ 255-262; 1972 Hawaii Sess. Laws, Act 9, c. 12, pt. II, at 126-29); *see also Young v. American Mini Theatres*, 427 U.S. 50, 53 & n. 4, 96 S.Ct. 2440, 2444 & n. 4, 49 L.Ed.2d 310 (1976) (Detroit zoning ordinance). Other states have chosen, by using language like that in the *Roth* footnote, a third way to define appeal

to the prurient interest. The Ohio legislature devised the following alternative definitions:

> "(A) Any material or performance is 'obscene' if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:
>
> "(1) Its dominant appeal is to *prurient interest;*
>
> "(2) Its dominant tendency is to arouse *lust* by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;
>
> "(3) Its dominant tendency is to arose *lust* by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;
>
> "(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to *prurient interest,* when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine, scientific, educational, sociological, moral, or artistic purpose." Ohio Rev. Code Ann. § 2905.34 (Supp.1972), now Ohio Rev.Code Ann. § 2907.01 (1975).

See Art Theatre Guild, Inc. v. Ewing, 421 U.S. 923, 923-24, 95 S.Ct. 1649, 44 L.Ed.2d 82 (1975) (Brennan, J., dissenting from dismissal for want of a substantial federal question) (emphasis added). The state courts enjoined the showing of a film under this statute. The Supreme Court dismissed an appeal from the injunction. *Id.* at 923, 95 S.Ct. at 1649. Although the Court clearly had the "ultimate power . . . to conduct an independent review of [any] constitutional claims," *Miller,* 413 U.S. at 25, 93 S.Ct. at 2615, it saw no substantial federal question raised despite the use of the word "lust." *See also State ex rel. Keating v. "Vixen",* 35 Ohio St.2d 215, 301 N.E.2d 880 (1973) (without construing the Ohio statutes in any way, holding they comport with *Miller*).

Nebraska's definition of obscenity, Neb. Rev.Stat. § 28-926.07 (1964), incorporates language from *Roth* and the Model Penal Code as alternatives. The statute asks whether the dominant theme of material "appeals to the prurient interest, which is to excite *lustful thoughts*, or a shameful or morbid interest in nudity, sex, or excretion which goes substantially beyond the customary limits of candor." *Id.* (emphasis added). Ordered to reconsider a conviction under section 28-926.07 in light of *Miller*, the Nebraska Supreme Court found "the Nebraska statutes fully comply with the requirements of *Miller v. California* . . . . We have not given them a new or different construction [to reach that conclusion] . . . ." *State v. Little Art Corp.*, 191 Neb. 448, 215 N.W.2d 853, 856, *on remand from* 414 U.S. 1151, 94 S.Ct. 907, 39 L.Ed.2d 105 (1974). *See* Note, *Community Standards, Class Actions, and Obscenity Under* Miller v. California, 88 Harv.L.Rev. 1838, 1847 n. 51 (1975). Notably, the court considered "lust" and "lasciviousness" equivalent: "The word prurient in its application to obscenity means 'tending to excite lasciviousness' and lasciviousness means the presence or arousal of sexual desire. Similarly applied to obscenity the word lustful refers to sexual desire." *Id.*

In Georgia, although the statute tracks the Model Penal Code definition of obscenity, the courts have recently defined material appealing to the prurient interest as "material which has a tendency to excite *lustful* thoughts." *Spry v. State*, 156 Ga. App. 74, 274 S.E.2d 2, 5 (Ga.App.1980) (emphasis added). A jury instruction along those lines "simply gave the jury a better understanding of the meaning of prurient appeal. See *Roth v. United States*, 354 U.S. 476, 477(4), 487 [77 S.Ct. 1304, 1310, 1 L.Ed.2d 1498] . . . ." *Spry v. State*, 274 S.E.2d at 5.

It would appear, therefore, that neither the Supreme Court nor state courts have abandoned the use of the term "lust" in proscribing obscenity under the first amendment. The Model Penal Code definition, although helpful, has not been decreed the only acceptable method of defining prurient interest.

The majority's other argument is that the meanings of words change, and "lust" no longer aids anyone in defining prurient interest. The scope of obscenity may indeed differ from place to place, time to time, and culture to culture. *See, e.g.*, Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U.Pa.L.Rev. 45, 53 & n. 52 (1974), *citing* G. Gorer, *The Danger of Equality* 218 (1966), and La Barre, *Obscenity, An Anthropological Appraisal*, 20 Law and Contemp.Prob. 533, 541-42 (1955), (certain southsea island cultures find eating in public obscene). In our obscenity jurisprudence, this concern for changing definitions is met head-on by the criterion of "contemporary community standards," *Miller*, 413 U.S. at 24, 93 S.Ct. at 2615; *Roth*, 354 U.S. at 489-90, 77 S.Ct. at 1311-12. *See McKinney v. Alabama*, 424 U.S. 669, 689-90, 96 S.Ct. 1189, 1200, 47 L.Ed.2d 1189 (1976) (Brennan, J., concurring in the result) ("community standards are inherently in a state of flux . . . ."). *Cf. Broadrick v. Oklahoma*, 413 U.S. 601, 608, 93 S.Ct. 2908, 2913, 37 L.Ed.2d 830 (1973) ("Words inevitably contain germs of uncertainty . . . ."). The majority, however, finds the Supreme Court's explicit provision for ascertaining change inadequate. Discarding the term "lust" on purely "legal" grounds of changed societal definition usurps the purpose of the "contemporary community standards" test.

The majority also forgets that any purely legal definitions in this area are less dependent on particular editions of dictionaries, or on an interview in *Playboy* magazine,[1] than on the Supreme Court. *See, e.g., Miller*, 413 U.S. at

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[1]It seems strange that the majority's argument for a different sociological view of lust depends so heavily on President Carter's personal views. Furthermore, the majority has misinterpreted those views. President Carter characterized lust as a sin requiring divine forgiveness, not as something "acceptable" in our community. *See* Playboy Interview: Jimmy Carter, *Playboy*, Nov. 1976 at 86:

"I try not to commit a deliberate sin. I recognize that I'm going to do it anyhow, because I'm human and I'm tempted. . . . .

I've looked on a lot of women with lust. I've committed adultery in my heart many times. This is something that God recognizes I will do—and I have done it—and God forgives me for it."

18 n. 2, 93 S.Ct. at 2612 n. 2 (words "obscene material" have a specific judicial meaning derived from *Roth*). The Supreme Court has not adopted the definitional change as embraced by the majority. The Court has used "lust" to help define "prurient interest." *Roth*, 354 U.S. at 487 n. 20, 77 S.Ct. at 1310 n. 20. The Court has reconfirmed the vitality of this use by citation to *Roth*. *See Miller*, 413 U.S. at 18 n. 2, 93 S.Ct. at 2612 n. 2. *Cf. Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 n. 10, 95 S.Ct. 2268, 2275 n. 10, 45 L.Ed.2d 125 (1975) ("[T]o be obscene, 'such expression must be, in some significant way, erotic.' "), *citing Cohen v. California*, 403 U.S. 15, 20, 91 S.Ct. 1780, 1785, 29 L.Ed.2d 284 (1971), which, in turn, cites solely *Roth*. The Supreme Court has not subsequently forbidden the use of "lust" to help define "prurient interest." *See Art Theatre Guild, Inc. v. Ewing*, 421 U.S. 923, 95 S.Ct. 1649, 44 L.Ed.2d 82. State courts have upheld the use of "lust" since *Miller* to help define prurient interest. *E.g., State v. Little Art Corp.*, 191 Neb. 448, 215 N.W.2d 853. Therefore, I conclude that the majority is wrong in holding as a matter of law that alleged, but unproven, changes in society's definition of "lust" authorize this court to erase the word from a constitutionally permissible definition. If there has been a change in the community view, it will be expressed in the first prong of the *Miller* test in assessing contemporary community standards.

Dealing with an obscenity definition is not easy work. Often reasonable minds will differ. Indeed, had I been the drafter of the Washington statute, I would have used a different definition. But the question before us is whether, as a matter of law, use of the word "lust" as part of the definition of prurient interest violates the first amendment. I conclude that the majority was wrong in reading "lust" out of the *Roth* definition as affirmed by *Miller* and that the majority was wrong in holding, as a matter of law, that the meaning of "lust" has changed so that it may not be a part of the *Roth-Miller* definition of prurient interest.

At worst, Washington's use of "lust" taken from *Roth* stands subject to construction in light of *Miller*, which

cited that part of *Roth* sixteen years later. A "limiting" construction is so obvious that, for prudential reasons, we should at least refuse to decide the plaintiffs' constitutional challenges on the basis of Washington's mere use of the word "lust" until a case arises applying the statute. *See, e.g., Broadrick v. Oklahoma,* 413 U.S. at 613, 93 S.Ct. at 2916; *see also* Monaghan, *Overbreadth,* 1981 S.Ct.Rev. 1, 35 (in a declaratory judgment action, the litigant in substance asks "whether the courts will, as a matter of statutory construction, refuse to narrow the statute to constitutional boundaries . . . ."). *Cf. Dombrowski v. Pfister,* 380 U.S. 479, 491-92, 85 S.Ct. 1116, 1123-24, 14 L.Ed.2d 22 (1965) (no readily apparent construction could repair the vagueness of the state law in question, so, in the face of threatened prosecutions, plaintiffs received "appropriate equitable relief without awaiting declaratory judgements in the state courts").

As another court recently observed, "[w]e must not make it impossible to draft legislation by finding facial overbreadth and ambiguity in all words." *Red Bluff Drive-In, Inc. v. Vance,* 648 F.2d 1020, 1034 (5th Cir.1981), *cert. denied,* 455 U.S. 913, 102 S.Ct. 1264, 71 L.Ed.2d 453 (1982). The majority, by finding facial overbreadth in the word "lust," forbids Washington to draft legislation based on Supreme Court precedent. The majority, I conclude, is wrong.

SPOKANE ARCADES, INC.,
a Washington corporation, Plaintiff,

v.

The Honorable KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only; Donald C. Brockett, Prosecuting Attorney of Spokane County, in his representative capacity only; and James Sloane, Spokane City Attorney, in his representative capacity only, Defendants.

J-R DISTRIBUTORS, INC., Plaintiff,

v.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; Donald C. Brockett, in his official capacity as Prosecuting Attorney, Spokane County, State of Washington; James Sloane, in his official capacity as City Attorney for the City of Spokane, Washington; Jeffery C. Sullivan, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington; and Fred Andrews, in his official capacity as City Attorney for the City of Yakima, Washington, Defendants.

AZURE ENTERTAINMENT CORPORATION
OF WASHINGTON, Plaintiff,

v.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; Donald C. Brockett, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington; and James Sloane, in his official capacity as City Attorney for the City of Spokane, Washington, Defendants.

PLAYTIME THEATRES, INC., a Washington
corporation, Plaintiff,

v.

The Honorable KENNETH EIKENBERRY, as Attorney Gen-

eral of the State of Washington, in his representative capacity only; Donald C. Brockett, Prosecuting Attorney of Spokane County, in his representative capacity only; and James Sloane, Spokane City Attorney, in his representative capacity only and Norm Maleng, Prosecuting Attorney of King County in his representative capacity only, Defendants.

JACK BURNS, in his representative capacity as Executor of the Estate of Selom F. Burns, Plaintiff,

v.

The Honorable KENNETH EIKENBERRY as Attorney General of the State of Washington, in his representative capacity only, Defendant.

The AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON; Madrona Publishers, Inc.; Superior Publishing Company; Washington Library Association; Pacific Northwest Booksellers Association; Motion Picture Exhibitors of Washington, Alaska, and Northern Idaho; Washington State Council of Teachers of English; Washington Library Media Association; and the Community College Librarian and Media Specialists' Association of Washington, Plaintiffs,

v.

The Honorable KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only, Defendant.

KUKIO BAY PROPERTIES, INC., a Washington corporation, Plaintiff,

v.

Norm MALENG, Prosecuting Attorney of King County, in his representative capacity only, Defendant.

Nos. C-82-223 RJM, C-82-230 RJM, C-82-231 RJM, C-82-239 RJM, C-82-240 RJM, C-82-283 RJM and C-82-354 RJM.

United States District Court, E.D. Washington.

July 2, 1982.

Consolidated cases were brought questioning constitutionality of Washington statute regulating pornography and moral nuisances. The District Court, Robert J. McNichols, Chief Judge, held that: (1) Washington statute complied with minimum requirements of *Miller v. California*; (2) statute did not violate title object clause of State Constitution; and (3) whether inclusion of emergency clause violated prescriptions of Washington Constitution was matter best left to ultimate resolution by state judiciary.

Ordered accordingly.

1. Federal Courts — 46

Where claim is predicated upon alleged abridgement of First Amendment rights, federal court should abstain only in face of special circumstances. U.S.C.A. Const. Amend. 1.

2. Constitutional Law — 48(1)

Statutes, when tested for constitutionality, must be construed in common-sense rather than hypertechnical fashion.

3. Constitutional Law — 90.1(8)

Society has right to regulate, or to proscribe completely, dissemination of sexually oriented material found repugnant to prevailing moral standards.

4. Constitutional Law — 90.1(8)

Sexually oriented matter, in order to fall outside ambit of protected speech or activity, must fail a tripartite test; basic guidelines for trier of fact must be whether average person, applying contemporary community standards, would find that work, taken as a whole, appeals to prurient interest, whether work depicts or describes, in patently offensive way, sexual conduct specifically defined by applicable state law, and whether work, taken as a whole, lacks serious literary, artistic, political, or scientific value. U.S.C.A. Const.Amend. 1.

5. Obscenity — 2.5

Washington statute regulating pornography and moral nuisances complies with minimum requirements of *Miller v. California* since there could be little doubt that jurors could properly characterize material in accord with first prong of *Miller*, section describing those obscene representations or depictions would satisfy second *Miller* prong, and use of phrase "in the context in which it is used" serves a limiting function and enhances specificity with which a trial court could address existence of literary, artistic, political or scientific value. U.S.C.A.Const.Amend. 1.

6. Obscenity — 2

Obscenity stands outside umbrella of Constitution.

7. Obscenity — 7

As unprotected activity, lawfully punishable by sanctions, promotion of obscenity stands in no different posture than would any other activity inimical to public interest and subject to criminal penalties.

8. Obscenity — 2.5

Washington statute regulating pornography and moral nuisances met minimal constitutional requirements with respect to prior restraint in light of its statutory scheme defining scienter. Wash.Laws 1982, ch. 184, § 1 et seq.; U.S.C.A.Const.Amend.1.

9. Obscenity — 18

There is no per se constitution constraint against imposition of civil sanctions for obscenity-related offenses.

10. Obscenity — 1.2

Civil action should require same element of scienter as is mandated in criminal prosecution with respect to obscenity actions.

11. Obscenity — 18

Under Washington statute regulating pornography and moral nuisances, trial court may not act with unlimited discretion and without predefined and objectively ar-

ticulated standard; rather, court must ascertain nature and extent of ill-gotten gains, after an adjudication of illegality, and impose penalties accordingly and underlying purpose of fines bears rational relationship to activity sought to be proscribed and is entirely within legitimate parameters of state's police powers. Wash. Laws 1982, ch. 184, § 1 et seq.

12. Criminal Law — 1206(2)

Where punishment is completely without rational nexus to legitimate social goals, principle of proportionality may be applicable.

13. Obscenity — 2.5

In view of Washington's compelling state interest in controlling commercial obscenity, there was rational connection between criminal penalties contemplated by Washington statute regulating pornography and moral nuisances and governmental objective of regulating pornography. Wash. Laws 1982, ch. 184 § 1 et seq.

14. Statutes — 109, 109.1

Purpose of title of statute is to put interested persons on notice of subject matter in manner sufficient to prompt inquiry into body of act if one should wish to do so; and where title is broad and comprehensive, it will be liberally construed. West's RCWA Const.Art. 2, § 19.

15. Statutes — 107(3)

Pornography and moral nuisances are not so discordant and inimical to one another as to be without rational unity; thus, Washington statute regulating pornography and moral nuisances did not violate State Constitution's title object clause. West's RCWA Const.Art. 2, § 19; Wash.Laws 1982, ch. 184, § 1 et seq.

16. Federal Courts — 383

Federal courts may rely upon intermediate appellate decisions where it is reasonable to assume that such opinions present current status of state law.

17. Constitutional Law — 50

Where conflict arises between source of political au-

thority, i.e., the people, and body to which such powers have been delegated, i.e., the legislature, there is no rule of reason which dictates that derivative powers be accorded weight over primary source of such authority.

18. Federal Courts — 43

With respect to question of whether inclusion of emergency clause in Washington statute regulating pornography and moral nuisances violated prescriptions of Washington Constitution, that was a matter best left to ultimate resolution by state judiciary. Wash.Laws 1982, ch. 184, § 1 et seq.; West's RCWA Const.Art. 2, § 1(b) as amend. 7.

Jack R. Burns, Hubbard, Burns & Meyer, Kirkland, Wash., Robert Eugene Smith, Encino, Cal., for plaintiff in No. C-82-223.

John H. Weston, David M. Brown, Brown, Weston & Sarno, Beverly Hills, Cal., Carl Maxcy, The Maxy Law Firm, Spokane, Wash., for plaintiffs in Nos. C-82-230 and C 82-231.

Jack R. Burns, Hubbard, Burns & Meyer, Kirkland, Wash., for plaintiff in No. C-82-239.

Charles Stixrud, Seattle, Wash., Jack R. Burns, Hubbard, Burns & Meyer, Kirkland, Wash., for plaintiff in No. C-82-240.

James Lowe, Bogle & Gates, Seattle, Wash., for plaintiff in No. C-82-283.

Jack R. Burns, Hubbard, Burns & Meyer, Kirkland, Wash., for plaintiff in No. C-82-354; Robert Eugene Smith, Encino, Cal., Arthur Schwartz, Denver, Colo., of counsel.

Jeffrey C. Sullivan, Pros. Atty., Yakima, Wash. for defendant Sullivan.

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Atty. Gen., Spokane, Wash., for defendant Eikenberry.

Donald C. Brockett, Spokane County Pros. Atty., Spokane, Wash., for defendant Brockett.

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Charles S. Hamilton, III, Deputy Pros. Atty. Civ. Div., Seattle, Wash., for defendant Maleng.

MEMORANDUM DECISION

ROBERT J. McNICHOLS, Chief Judge.

The issue in these consolidated cases[1] is the constitutionality of House Bill 626, an Act passed by the Washington Legislature regulating pornography and moral nuisances.[2] Plaintiffs have asked for extraordinary relief declaring the statute unconstitutional and enjoining its enforcement. Specifically, it is argued that provisions of the Act are overbroad and vague, and that the statute is more restrictive than the standard mandated by the United States Supreme Court, that it has a chilling effect on First Amendment freedoms, imposes cruel and unusual punishment, and is framed in violation of Washington State's constitution.

In passing upon the constitutionality of this Act, I have broken down discussion into three broad generic topics: (1) the substantive provisions, particularly in terms of the definitions employed; (2) the procedural aspects with emphasis on due process requirements; and (3) state constitutional questions.

[1] Jurisdiction is founded on the Federal Question Statute, 28 U.S.C. § 1331. It should be noted at the outset that defendants' arguments in favor of general abstention

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[1]Objection has been raised concerning the standing of several plaintiffs to participate in this action. I share in the reservation that some of these parties might more properly be cast in the role of amicus than as litigants. In view of the disposition of this matter, however, the question is largely academic.

[2]*Wash.Sess.Laws*, ch. 184, 47th Legis. (effective April 1, 1982).

are rejected. Where a claim is predicated upon alleged abridgement of First Amendment rights, a federal court should abstain only in the face of special circumstances. *Zwickler v. Koota*, 389 U.S. 241, 252, 88 S.Ct. 391, 397, 19 L.Ed.2d 444 (1967). The extenuating factors referenced in that decision are not present here.

[2] Second, I adhere to the well settled proposition that statutes, when tested for constitutionality, must be construed in a common sense rather than hypertechnical fashion. *See United States Civil Service Comm. v. Natl. Ass'n of Letter Carriers*, 413 U.S. 548, 579, 93 S.Ct. 2880, 2897, 37 L.Ed.2d 796 (1973); *United States v. Vuitch*, 402 U.S. 62, 72, 91 S.Ct. 1294, 1299, 28 L.Ed.2d 601 (1971).

I. SUBSTANTIVE PROVISIONS

[3, 4] Since *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed2d 419 (1973), there can be no question but that society has the right to regulate, or to proscribe completely, the dissemination of sexually oriented material found repugnant to prevailing moral standards. *Miller* mandates that such matter, in order to fall outside the ambit of protected speech or activity, must fail a tripartite test:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24, 93 S.Ct. at 2614 (citations omitted).

The parties are in solid agreement that this test is the well established law of the land and is unquestionably controlling in the instant case. Somewhat less mutuality of thought is apparent with regard to application of the individual prongs to HB 626, with the plaintiffs arguing that the Act deviates significantly from settled definitions ac-

corded a number of instrumental terms, and is thereby impermissibly both overbroad and vague.

With *Miller* as the analytical cornerstone, the task before the Court is to weigh plaintiffs' objections in light of the evolving body of case law springing forth since that seminal decision.

Plaintiffs attack the statute's definitions on a number of fronts. The textual portion of HB 626 which restates the *Miller* test[3] does exhibit some deviation from the language employed by the Supreme Court. Section 1(2), for example, reads: " 'Lewd matter' is synonymous with 'obscene matter' . . . " Section 1(3) is worded: " 'Lewdness' shall have and include all those meanings which are assigned to it under the common law." Reading these sections together, it may appear at first blush that the statute purports to impose a common law definition of obscenity in derogation of well-settled precedent. A careful reading of the bill, however, reveals that neither the terms "lewd" nor "lewdness" are employed in any substantive manner. In no way do they alter or impair the test for obscenity. Rather, these appellations are merely descriptive in nature. Indeed, under the statute's own terms, one must mentally substitute "obscene" wherever the term "lewd" is used.

Section 1(2)(a) is a virtually verbatim adoption of the first prong of the *Miller* test. Section 1(8), however, arguably impacts the integrity of that prong by defining "pruri-

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[3](2) "Lewd matter" is synonymous with "obscene matter" and means any matter: (a) Which the average person applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which explicity depicts or describes patently offensive representations or descriptions of:

(i) Ultimate sexual acts, normal or perverted, actual or simulated; or

(ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or

(iii) Violent or destructive sexual acts, including not [sic] not limited to human or animal mutilation, dismemberment, rape or torture; and

(c) Which, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value.

ent" as "that which incites lasciviousness or lust." Plaintiffs contend that "prurient" has a more circumscribed meaning, and point to case law noting in dicta that prurient interest entails "a shameful or morbid interest in nudity, sex, or excretion." *Roth v. United States*, 354 U.S. 476, 487 n.20, 77 S.Ct. 1304, 1310 n.20, 1 L.Ed.2d 1498 (1957). At the same time, however, *Roth* in actuality settled upon a shortened definition, *i.e.*, "material having a tendency to incite lustful thoughts." *Id.*[4]

At the risk of becoming enmeshed in semantical nitpicking, it should be noted that section 1(8) does not define what is obscene. That is a function of the conjunctive tripartite test. Rather, the section defines what is pornographic.

> The material we are discussing in this case is more accurately defined as "pornography" or pornographic material." "Pornography" derives from the Greek *(porne*, harlot, and *graphos*, writing). The word now means "... a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement."

Miller, supra, 413 U.S. at 19 n.2, 93 S.Ct. at 2612 n.2.

[5] Contrary to the layman's conception, "pornography" and "obscenity," when utilized as legal words of art, are not interchangeable in application, the former being a subspecies of the latter. *Id. See also Spokane Arcades v. Ray*, 449 F.Supp. 1145, 1151-52 n.6 (E.D.Wash.1978), *aff'd sub nom. Spokane Arcades v. Brockett*, 631 F.2d 135 (9th Cir. 1980), *aff'd* —— U.S. ——, 102 S.Ct. 557, 70 L.Ed.2d 468 (1981). That is to say, pornography is descriptive of the sexual character of erotic material and is not necessarily obscene. Before that latter label will attach, the material in question must also fail the second and third prongs

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[4]Whatever may be the value of dissenting opinions, I note with some interest that Justice Douglas placed the same construction on the decision's ultimate definition. In order for material to be pruient under the majority opinion, "[a]ll it need do is to incite a lascivious thought or arouse a lustful desire." *Roth, supra*, 354 U.S. at 514, 77 S.Ct. at 1324 (Douglas, J., dissenting).

of the *Miller* test. Thus, I have no difficulty whatever with the fact that §§ 1(2)(a) and 1(8) when read together define only pornography and not obscenity. The rationale of *Miller* and progeny is still served and there can be little doubt but that jurors will have sufficient command of the common meanings ascribed to lust and lasciviousness to properly characterize material in accord with the first prong of *Miller*.

Plaintiffs also call into question section 1(2)(b) which describes those representations or depictions which, when presented in a patently offensive manner, will satisfy the second *Miller* prong. Objection is raised with respect to both §§ 1(2)(b)(ii) and (iii). The former proscribes depictions of "[m]asturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area." It is argued that this list is more expansive than the examples suggested by *Miller*. *See* 413 U.S. at 25, 93 S.Ct. at 2615. So it is, but I find the additions to be permissible under the doctrine of *ejusdem generis*. *Cf. Ward v. Illinois*, 431 U.S. 767, 773-75, 97 S.Ct. 2085, 2089-90, 52 L.Ed.2d 738 (1977); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 52, 93 S.Ct.2628, 2632, 37 L.Ed.2d 446 (1973). The *Miller* Court very pointedly noted that the list promulgated in that decision was by no means exhaustive.

> We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a *few plain examples of* what a state statute could define for regulation ....

Id. at 25, 93 S. Ct. at 2615 (emphasis added); *see also Hamling v. United States*, 418 U.S. 87, 114, 94 S.Ct. 2887, 2906, 41 L.Ed.2d 590 (1974).

The additional proscriptions of HB 626, *i.e.*, bestiality, fellatio, and cunnilingus, are well within the spirit of *Miller*, and indeed, as held by one recent persuasive decision, such increase in specificity actually reduces the basis for claims of vagueness. *Red Bluff Drive-In v. Vance*, 648 F.2d 1020, 1026 (5th Cir. 1981), *cert. denied sub nom. The-*

atres West v. Holmes, —— U.S. ——, 102 S.Ct. 1264, 71 L.Ed.2d 453 (1982).

Plaintiffs also find objectionable on two counts § 1(2)(b)(iii) which proscribes "[v]iolent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture . . . ." It is contended first that the language "including but not limited to" runs afoul of the specificity mandated by *Miller.* 413 U.S. at 24, 93 S.Ct. at 2614. I am not persuaded. The phrase at issue is modified by the language "violent or destructive sexual acts," and I am confident that courts called upon to construe any future application of this section will be guided by that limiting phraseology. So viewed, the following quote from *Miller* becomes instructive:

> If a state law that regulates obscene material is thus limited, as written or *construed,* the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary.

413 U.S. at 25, 93 S.Ct. at 2615 (emphasis added).

With the same confidence in the integrity and wisdom of the appellate process as is evidenced by the foregoing passage, I cannot find the phrase complained of either facially overbroad or vague.

The second objection concerns reference to animals. The uninitiated might express some wonderment as to what possible nexus there might be between violent or destructive behavior directed toward animals and sexual materials. Such curiosity is quickly sated with a reading of *Miller v. Reddin,* 293 F.Supp. 216 (C.D.Cal.1968), *rev'd on procedural grounds,* 422 F.2d 1264 (9th Cir. 1970). *See also Red Bluff Drive-In, supra,* 648 F.2d at 1026. Plaintiffs' announced fear that depictions of hunting might fall within the proscriptions of HB 626 is totally specious.

Finally, the third prong of *Miller,* as embodied in § 1(2)(c), is also attacked by plaintiffs as an impermissible expansion of settled precedent. This section provides that

material failing the first two prongs which also, "when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value" will be deemed obscene. Objection is taken to the phrase "in the context in which it is used."

Were this language found in either the first or second prongs, which are the province of the jury and already highly subjective in nature, this modification of *Miller* might prove more troubling. In the first prong, the question would be whether material was prurient "in the context in which it is used." In the second, the question would be whether such matter was depicted in a patently offensive manner "in the context in which it is used." As plaintiffs point out, it is possible to conceive of situations in which this phrase could add yet another speculative factor. *United States v. Various Articles*, 600 F.2d 394 (2d Cir. 1979), *But see Ward v. Illinois*, 431 U.S. 767, 770 n.1, 97 S.Ct. 2085, 2088 n.1, 52 L.Ed.2d 738 (1977) contextual test approved by implication).

However, such is not the case here. By inserting the phrase in the third prong, *i.e.*, the objective test, this language, if anything, serves a limiting function and enhances the specificity with which a trial court must address the existence of literary, artistic, political, or scientific value. Viewed from another angle, it is difficult to see how the redeeming value of ostensibly obscene material can be "considered as a whole" without at the same time looking at the context. *See generally, Pinkus v. United States*, 436 U.S. 293, 303-04, 98 S.Ct. 1808, 1814-15, 56 L.Ed.2d 293 (1978).

For the foregoing reasons, I conclude that Washington's statutory scheme comports with the minimum requirements of *Miller* insofar as HB 626 sets forth substantive testing procedures in a constitutionally acceptable framework.

II. PROCEDURAL ASPECTS

A. Prior Restraint

Unquestionably, prior restraint of expression has long

and consistently been viewed with deep and abiding suspicion. *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n.13, 100 S.Ct. 1156, 1161 n.13, 63 L.Ed.2d 413 (1980) and authorities cited therein. In considering argument raising the spectre of such restraint, however, there is a basic premise which should be borne in mind:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. *These include the lewd and obscene . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality* . . .

Roth v. United States, 354 U.S. 476, 485, 77 S.Ct. 1304, 1309, 1 L.Ed.2d 1498 (1957) (emphasis original) quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, 62 S.Ct. 766, 769-69, 86 L.Ed. 1031 (1942).

[6, 7] It is now settled beyond dispute that obscenity stands outside the umbrella of the Constitution. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69, 93 S.Ct. 2628, 2641, 37 L.Ed.2d 446 (1973). As unprotected activity, lawfully punishable by sanctions, the promotion of obscenity stands in no different posture than would any other activity inimical to the public interest and subject to criminal penalties. It is beyond argument that a primary objective of sanctions is that of deterrence. Thus, if plaintiffs feel that HB 626 serves as a prior restraint on their ability or willingness to engage in activities proscribed under the statute, then it can only be concluded that the Act will serve its intended, and lawful, purpose.

[8] Such a construction, however, is an oversimplification, since the thrust of plaintiffs' argument is that the existence of HB 626 may have an inhibitory effect on protected activity as well as unprotected. The burden of drawing what may often be a fine line between the two, it is contended, will fall upon them; and an error in judgment

may result in prosecution prior to an adjudication of obscenity, or in self-imposed censorship.

The flaw in this approach is that it is predicated on the assumption that one cannot make an initial determination as to the nature of a given work and is at the mercy of a post facto adjudication. As a corollary, a further assumption is implied that the test for obscenity is so vague and unfathomable that it serves no definitive purpose. I am unable to so conclude. For reasons stated previously, HB 626 comports with the substantive standard enunciated by *Miller*. Undoubtedly, "the line between legitimate and illegitimate speech is often ... finely drawn." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559, 95 S.Ct. 1239, 1246, 43 L.Ed.2d 448 (1975). Nonetheless, it is not the function of this Court to cast doubts upon the efficacy of a Supreme Court decision which has stood the test of time without major modification. For the same reasons which validate a jury's ability to render a rational determination of obscenity, one charged with promotion is equally able to reach his own decision. "Simply stated, hard core pornography ... can and does speak for itself." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 n.6, 93 S.Ct.2628, 2634 n.6, 37 L.Ed.2d 446 (1973) quoting with approval, *United States v. Wild*, 422 F.2d 34, 36 (2d Cir. 1970), *cert. denied*, 402 U.S. 986, 91 S.Ct. 1644, 29 L.Ed.2d 152 (1971). Subjective variables are most certainly present in reaching such a determination, but these are no more imponderable than those representing elements of any number of malum prohibitum offenses.

> That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense ... The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite

> warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more.

United States v. Petrillo, 332 U.S. 1, 7-8, 67 S.Ct. 1538, 1541-42, 91 L.Ed. 1877 (1947) (citations omitted).

Nor does placing the burden of prior determination upon the promoter present any insurmountable difficulty:

> The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity.

Mishkin v. New York, 383 U.S. 502, 511, 86 S.Ct. 958, 964, 16 L.Ed.2d 56 (1966). The statutory scheme defining scienter approved in *Mishkin* parallels section 1(1) of HB 626 and I am satisfied that the Act meets minimum constitutional requirements in this regard.

B. Civil Penalty

[9] As an initial proposition, there is no per se constitutional constraint against the imposition of civil sanctions for obscenity-related offenses:

> We need not linger over the suggestion that something can be drawn out of the Due Process Clause of the Fourteenth Amendment that restricts [a state] to the criminal process in seeking to protect its people against the dissemination of pornography. It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a *qui tam* action or by an injunction or by some or all of these remedies in combination, is a matter within the legislator's range of choice. If [a state] chooses to subject persons who disseminate obscene "literature" to criminal prosecution and also to deal with such books as deodands of old, or both, *with due regard, of course, to appropriate opportunities for the trial of the underlying issue*, it is not for us to gainsay its selection of remedies.

Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441, 77 S.Ct.

1325, 1327, 1 L.Ed.2d 1469 (1957) (citations omitted) (emphasis added).

The highlighted language is the crux of the problem. If HB 626 dealt with injunctive procedures, arguably of a prior restraint nature and subject to judicial enforcement through contempt proceedings there would be a wealth of case law against which to weigh the propriety of the Act. *E.g., Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980: *Walker v. City of Birmingham*, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967). If the statute envisioned a system of administrative controls, such as licensing, there would likewise exist dispositive Supreme Court decisions. *E.g. Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975); *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963).

Here, however, the statute is in the nature of what *Kingsley* refers to as a *qui tam* action and this court is largely without precedential guidance. One thing is certain. There can be no deviation from the tripartite *Miller* test:

> While this procedure is civil in nature, and does not directly involve the state criminal statute proscribing exhibition of obscene material, the Georgia case law permitting civil injunction does adopt the definition of "obscene materials" used by the criminal statute.

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 54, 93 S.Ct. 2628, 2633, 37 L.Ed.2d 446 (1973).

While *Paris* concerned an injunctive action, I think it unmistakable that in any adjudication of obscenity, there can be only one criteria, and that is as set forth in *Miller*. H.B. 626 satisfies this requirement in that section 1 thereof is fully applicable to both civil and criminal phases of the Act.

Nor does application of rules of evidence or civil procedure present cause for concern since section 3(3) provides that:

> The rules of evidence, burden of proof, and all other rules of court shall be the court rules generally applicable to civil cases in this state: *Provided,* That the standard of proof on the issue of obscenity shall be clear, cogent, and convincing.[5]

[10] Further, although far from a settled issue, a civil action should require the same element of scienter as is mandated in criminal prosecution. *Grove Press, Inc. v. Flask,* 326 F.Supp. 574, 578 (N.D.Ohio 1970), *vacated on other grounds,* 413 U.S. 902, 93 S.Ct. 3026, 37 L.Ed.2d 1013 (1973). Once again, HB 626 satisfies this requirement. *See* §§ 1(1); 4(2).

Two remaining areas are somewhat disconcerting. The first involves the use of a jury as a finder of fact:

> In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members.

Miller, supra, 413 U.S. at 26, 93 S.Ct. at 2616 (1973).

It is ture that the *Miller* Court was addressing criminal prosecutions in drafting the foregoing, but it is also true that if this language were to be construed as applying *only* to criminal actions, it would be both gratuitous and superfluous. The same rationale which mandates the jury system as the most accurate barometer of contemporary community standards applies with equal force in the civil arena. The wording of section 3(3) would imply that it was the legislative intent to preserve a defendant's access to the jury. Nonetheless, I am troubled by the possibility that Washington's Constitution may not necessarily mandate such a result.

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[5]Within the civil context, the evidentiary standard of "clear, cogent and convincing" is constitutionally adequate. *Cooper v. Mitchell Bros. Santa Ana Theatre,* 454 U.S. 90, 102 S.Ct. 172, 70 L.Ed.2d 262 (1981).

> Under Const. art 1, § 21, the right of trial by jury shall remain inviolate. . . . In civil cases, a jury is available if a statute so provides or if the matter is one which was triable before a jury when the constitution was adopted.

State v. Anderson, 94 Wash.2d 727, 728, 620 P.2d 76 (1980). *See also* Wash.Ct.R. (Cr) 38(a).

Whether Washington courts would ultimately determine that a *qui tam* action such as contemplated under HB 626 "was triable before a jury when the [state] constitution was adopted" is a matter yet unsettled. In passing upon the constitutionality of the Act vis a vis the question of trial by jury in civil prosecutions, I do so with the understanding that the legislature incorporated such right through the wording of § 3(3).

A second area of concern lies in § 4(2) which provides:

> Upon a determination that a defendant has with knowledge maintained a moral nuisance, the court shall impose a civil penalty and judgment of an amount as the court may determine to be appropriate. In imposing the civil penalty, the court shall consider the wilfulness of the defendant's conduct and the profits made by the defendant attributable to the moral nuisance.

Plaintiffs characterize this section as allowing for unlimited fines which could potentially close an establishment's doors as effectively as would a padlock. It is contended that such potential carries with it all the hallmarks of prior restraint. I am not persuaded. For reasons already stated, sanctions imposed after an adjudication of obscenity affect only accomplished behavior and do not rise to the level of either prior restraint or an impermissible chilling effect. In summarizing previous discussion, the following quote is appropriate.

> [P]laintiffs attack the state statutory scheme as imposing unnecessarily broad and sweeping penalties on the distribution of obscene matter in order to chill the dissemination of borderline protected materials. We disagree. The penalties in the instant scheme are only

> to be imposed after a full adversary hearing and a judicial determination on the merits. No penalty will be imposed unless the materials are adjudicated or admitted to be obscene and the requisite scienter was present. . . .
>
> The cases cited by plaintiffs are inapposite. . . . Each of these cases involves penalties or burdens being placed by administrative bodies upon an individual exercising his First Amendment rights. [This statute] specifically requires an adversary hearing and a judicial determination before any speech or material may be enjoined or any penalties imposed.

Grove Press, supra, 326 F.Supp. at 579-80 (citations omitted).

Further, contrary to plaintiffs' assertion, a penalty, while not circumscribed in terms of dollars, is limited in a sufficiently concrete manner to avoid any Fifth Amendment "taking" issue. The statute clearly provides that in imposing a penalty, the court must have in mind both "the willfulness of the defendant's conduct and the profits made by the defendant attributable to the moral nuisance." Section 4(2). So prescribed, the rationale of *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974) is instructive. In considering the constitutionality of forfeiture of property used in transporting contraband, the Court first reviewed historical development of the "deodand" concept, then held that the modern counterpart found in forfeiture statutes serves appropriate "punitive and deterrent purposes . . . . both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." *Id.* at 686-87, 94 S.Ct. at 2093-94. The same motivating rationale is eminently served by forfeiture of illegal profits in the instant case.

[11] This is not a situation where a trial court may act with unlimited discretion and without predefined and objectivity articulated standards. Rather, the court must ascertain the nature and extent of ill-gotten gains, *after* an adjudication of illegality, and impose penalties accord-

ingly. The underlying purpose of such fines thus bears a rational relationship to the activity sought t be proscribed, and is entirely within legitimate parameters of the state's police powers. In summary, the purpose is:

> not to prevent future expression, but to punish past illegal conduct by depriving the violator of economic gain. That is a permissible state objective, implemented by permissible means.

State ex rel. Kidwell v. United States Marketing, Inc., 102 Idaho 451, ——, 631 P.2d 622, 628 (1981), *appeal dismissed per stip.*, —— U.S. ——, 102 S.Ct. 1649, 71 L.Ed.2d 878 (1982).

Considering both the existence of a reasonable nexus between the activity sought to be interdicted and the means chosen to accomplish that end, and the fact that penalties are levied only after a full adversary hearing accompanied by the panoply of procedural safeguards, the hollowness of plaintiffs' position in the instant case is well illustrated by the following quotation from *Kidwell.*

> [I]f a bookseller, having fallen behind on his property taxes, loses his bookstore at a tax sale, he will not be heard to complain that the state imposed an unlawful prior restraint upon his bookselling activities. If the same bookseller is convicted of the crime of distributing obscene materials, he may be imprisoned, and yet he will not be heard to complain that his incarceration constitutes a prior restraint upon his ability to disseminate protected speech, even though it is quite clear that it has that effect.
>
> * * * * * * * *
>
> Like a tax sale, the forfeiture is directed strictly at property, apart from the content of any expression contained therein. And like imprisonment for a criminal obscenity transgression, the forfeiture is intended to penalize past distributions of illegal and unprotected obscenity.

Id. at ——, 631 P.2d at 627-28[6]

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[6]The Statute approved in *Kidwell* goes far beyond the sanctions contemplated in HB 626 providing, as it does, for a one year closure of any establishment found to be a moral nuisance.

c. Criminal Penalty

It is argued that stiff criminal penalties of up to $50,000 per violation run afoul of both equal protection and cruel and unusual punishment prohibitions. The well-settled rule is that:

> Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.
>
> * * * * * * * *
>
> [F]or crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.

Rummel v. Estelle, 445 U.S. 263, 272-74, 100 S.Ct. 1133, 1138-39, 63 L.Ed.2d 382 (1980).

[12] Legislative authority is not wholly free of restraint, of course. Where a punishment is completely without a rational nexus to legitimate social goals, the principal of proportionality may be applicable. *Id.* at 274 n.11, 100 S.Ct. at 1139 n.11; *see also Coker v. Georgia,* 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977). The key, therefore, to the validity of a given punishment lies in the magnitude of societal interest at stake.

> The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.
>
> * * * * * * * *
>
> The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as "wrong" or "sinful." The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to

> jeopardize, in Mr. Chief Justice Warren's words, the States' "right ... to maintain a decent society."

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63-69, 93 S.Ct. 2628, 2638-2641, 37 L.Ed.2d 446 (1973).

[13] In view of the state's compelling interest in controlling commercial obscenity, I conclude that there is a rational connection between the criminal penalties contemplated in HB 626 and the governmental objective of regulating pornography. It is well within the prerogative of the legislature to impose sanctions which are more than merely a cost of doing business.

III. STATE CONSTITUTIONAL QUESTIONS

A. More than one subject in title:

Article 2, Section 19 of the Washington State Constitution provides: "No bill shall embrace more than one subject, and that shall be expressed in the title." It is argued that HB 626, which relates to both pornography and moral nuisance, must be struck down as an impermissible joinder of discrete subjects. The Washington judiciary has never read the applicable provision so narrowly.

> We do not agree that the initiative covers a multiplicity of subjects or subjects that are not reasonably related. On the contrary, each of the subtopics of [the initiative] bears a close interrelationship to the dominant intendment of the measure. We have repeatedly held that
>
> > where the title embraces a general subject it is not violative of the constitution even though the general subject contains incidental subjects. All that is required is that there be some "rational unity" between the general subject and the incidental subdivision. *Kueckelhan v. Federal Old Line Ins. Co.*, 69 Wn.2d 392, 418 P.2d 443 (1966); *Robison v. Dwyer*, 58 Wn.2d 576, 364 P.2d 521 (1961).
>
> *Water Dist. 105 v. State, 79 Wash.2d 337, 341, 485 P.2d 66 (1971).*

Fritz v. Gorton, 83 Wash.2d 275, 290, 517 P.2d 911, 920-21 (1974).

Even where the subjects at issue might be discrete if viewed in the abstract, it is incumbent upon the court to go a step further and take a practical construction of such subjects in light of the scope of a given measure. *Goodner v. Chicago, Mil Etc. R. Co.*, 61 Wash.2d 12, 23, 377 P.2d 231, 237-38 (1962). Stated another way, it is the legislative *purpose* which is the critical focal point, and:

> all matters which are naturally and reasonably connected with it, and all measures which will, or may, facilitate the accomplishment of the purpose so stated, are properly included in the act and are germane to its title.

Gruen v. State Tax Comm., 35 Wash.2d 1, 22-23, 211 P.2d 651, 664 (1949).

More concretely yet, the Washington Supreme Court has held that:

> To constitute plurality of subject, an act must embrace two or more *dissimilar and discordant* subjects, that by no fair intendment can be considered as having any legitimate connection with or relation to each other. Within the meaning of the constitutional provision, matters which apparently constitute distinct and separate subjects are not so where they are not incongruous and diverse to each other.
>
> *Casco Co. v. Public Util. Dist. No. 1*, 37 Wash.2d 777, 790-91, 226 P.2d 235, 242 (1951).

> [14] The purpose of a title is to put interested persons on notice of the subject matter in a manner sufficient to prompt "inquiry into the body of the act" if one should wish to do so; and where "a title is broad and comprehensive, it will be liberally construed." *State v. Charboneau's*, 27 Wash.App. 5, 9-10, 615 P.2d 1321, 1324, *rev. denied*, 94 Wash.2d 1021 (1980). *See also State v. Winters*, 67 Wash.2d 465, 466, 407 P.2d 988, 989 (1965).

[15] I am unable to conclude that pornography and moral nuisances are so discordant and inimical to one another as to be without "rational unity." Indeed, under the language of section 2 of HB 626, it would appear that the

former is subsumed into the latter. Certainly the title is "broad and comprehensive" enough to put any reasonable legislator on notice as to the nature and scope of the law. A constitutional challenge based on Article 2, section 19 must therefore fail.

B. Emergency Clause

During the height of the populist movement in 1912, the electorate adopted amendment 7 to the state constitution which provided, *inter alia,* for reservation of the power of referendum.

> The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing institutions . . .

Wash. Const. art. 2, § 1(b). *See generally Fritz v. Gorton,* 83 Wash.2d 275, 279-84, 517 P.2d 911, 915-17 (1974); *State ex rel. Blakeslee v. Clauser.*, 85 Wash. 260, 264 *et seq.*, 148 Pac. 28, 30 *et seq.* (1915) for an historical and philosophical perspective on direct legislation.

Analytical emphasis has ebbed and flowed over the course of time depending upon the complement of the court at any given historical moment and the comparative trust members of the judiciary placed in the legislature vis a vis the electorate. Perhaps nothing has changed since the following observation issued some sixty-seven years ago:

> There has been a wide inconsistency in the holding of the courts upon constitutional questions. They have declared that, where the legislature has said there is an emergency, although undefined, its declaration is final and conclusive upon all. At the same time, and in the same day, they have not hesitated to declare acts of the legislature to be in derogation of the fundamental law or some of the legislative limitations of the constitution.

State ex rel. Brislawn v. Meath, 84 Wash. 302, 307, 147 Pac. 11, 13 (1915).

While as a practical matter the foregoing may still carry a ring of truth, there has been a decided shift in recent years away from a presumption of constitutionality of emergency legislation in favor of exploring the factual foundation supporting a declaration of emergent circumstances. Just twenty years ago, the firm rule was:

> With regard to the weight to be given such clauses [of the existence of an emergency], the rule to which this court has most consistently adhered, is that most recently stated in *State ex rel. Pennock v. Coe*, 42 Wn.(2d) 569, 257 P.(2d) 190, quoting from *State ex rel. Pennock v. Reeves*, 27 Wn.(2d) 739, 179 P.(2d) 961:
>
> > . . . such legislative declaration of emergency and necessity for the enactment is conclusive and must be given effect, unless the declaration on its face is obviously false; and, in determining the truth or falsity of the legislative declaration, we will enter upon no inquiry as to the facts, but must consider the question from what appears upon the face of the act, aided by the court's judicial knowledge. *State ex rel. Hamilton v. Martin*, 173 Wash. 249, 23 P.(2d) 1. We must give to the action of the legislature and its declaration of an emergency every favorable presumption.

State ex rel. Hoppe v. Meyers, 58 Wash.2d 320, 326, 363 P.2d 121, 125 (1961).

This rule was questioned in *State ex rel. Humiston v. Meyers*, 61 Wash.2d 772, 380 P.2d 735 (1963). In reviewing precedent, the court noted that:

> The touchstone of the rule is ". . . what appears upon the face of the act, aided by the court's judicial knowledge."
>
> The face of the act [in this case] is patently devoid of any facts relating to an emergency (with the exception of the emergency clause itself). The act repeals nothing; it appropriates nothing; it taxes nothing. In nowise is the act comparable to the act

> considered by the court in *State ex rel. Hamilton v. Martin*, 173 Wash. 249, 23 P.(2d) 1 (1933), wherein the acts recited *facts* showing an emergent situation, which facts were, for the most part, capable of judicial knowledge. We do not indicate that the inclusion of a legislative declaration of policy in an act would, ipso facto, remove the emergency clause from the ambit of the court's constitutional duty to project and test the clause upon the backdrop of the constitution.

Id. at 778, 380 P.2d at 739.

[16] Intermediate appellate courts have since picked up the *Humiston* approach and refined its thrust more narrowly.[7] Bypassing the line of authority relied upon in *Hoppe v. Meyers, supra*, the court in *Swartout v. City of Spokane*, 21 Wash.App. 665, 586 P.2d 135 (1978), *rev. denied*, 91 Wash.2d 1023 (1979) reached back in time to offer the following elucidation:

> [I]t [is] too clear to require argument that the legislature cannot defeat the constitutional right, reserved by the people [the right of referendum] .... by *merely* inserting in an act the [language contained in the exception] ....
>
> * * * * * * * *
>
> Such a label may obviously be utterly and completely false. It would be scandalous indeed if the constitutional right of referendum could be thwarted by the mere use of false labels. As was said in argument, "If this can be done, the right of referendum is a dead letter in this state."

Id. at 672, 586 P.2d at 140 quoting *State ex rel. Kennedy v. Reeves*, 22 Wash.2d 677, 681-82, 157 P.2d 721, 723 (1945).

The essence of the *Swartout* decision is twofold: a declaration of emergency must contain basic underlying

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[7]Federal courts may rely upon intermediate appellate decisions where it is reasonable to assume that such opinions present the current status of state law. *See Tomlin v. Boeing*, 650 F.2d 1065, 1069 n. 7 (9th Cir. 1981).

facts supporting a statement of urgency;[8] and any legislation passed in derogation of the people's right to referendum is void *ab initio*.[9]

City of Spokane v. Harris, 25 Wash.App. 345, 606 P.2d 291 (1980) is the most recent decision on point. Expanding upon and explaining its holding in *Swartout*, the court in effect restated the *Humiston* approach with a measure of clarity which leaves no doubt as to how HB 626 must be construed.

> Whether a law is necessary for the immediate preservation of the public's health, safety and welfare is not so readily determined by looking to the law's subject matter. There must be a statement of some underlying fact to support the emergency or other facts of which the court can take judicial notice. This is particularly so in this case where the [previous] ordinance has been in effect 58 years before being amended.

25 Wash.App. at 348, 606 P.2d at 292.

Despite the wide swings evidenced in judicial thought over the course of years, what we have here is not so much a radical shift in substantive analysis as it is a shifting of the burden of persuasion. The standard rule adopted by Washington concerning challenges to constitutional validity of a statute is that "there is a presumption of the constitutionality of the legislative enactment unless its repugnancy to the constitution clearly appears or is made to appear *beyond a reasonable doubt*." *Water Dist. 105 v.*

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[8]Lest a false impression be left, it should be noted that the Court was construing the City's charter which specified that emergency legislation must contain a "statement of urgency." The state constitution requires no such statement; only that the act be *in fact* of an emergent nature. The decision is cited primarily for its interest as a point of transition to the analysis employed in *City of Spokane v. Harris*, *infra*.

[9]The City's case was probably not helped by its display of incredible arrogance. In a letter to appellant, corporation counsel contended that:

> The charter does not require an emergency to exist when an ordinance is passed to become immediately effective. It merely requires that the council declare that an emergency exists.

21 Wash.App. at 671, 586 P.2d at 140.

State, 79 Wash.2d 337, 340, 485 P.2d 66, 68 (1971) (emphasis added). Given the reasoning of the line of cases surveyed, however, this rule of construction would appear not to obtain where the electorate's right to referendum is at issue. The basis for this deviation is simple enough.

> All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

Wash Const. art. 1, § 1.

[17] Thus, where a conflict arises between the source of political authority (the people) and that body to which such power has been delegated (the legislature), there is no rule of reason which dictates that derivative powers be accorded weight over the primary source of such authority.[10] The burden in the instant case is upon the defendants. The weight of that burden is largely an unsettled question.

HB 626 is clear on its face that it contains no recitation of underlying facts upon which any court could glean any indication of legislative intent in declaring an emergency. Section 10 is nothing more than the most conclusory and cursory attempt to use "magic words" at the expense of supporting facts. Thus, if the act is to be saved at all, it will only be through resort to information of which the court may take judicial knowledge.[11]

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[10]In making this observation, I am aware of the longstanding rule in Washington that:

> there is a distinct difference between the operative effect of the Federal constitution and that of a state constitution. The Federal constitution is a *grant* of power, whereas the state constitution is a *limitation* upon legislative power.

Union High School Dist. No. 1 v. The Taxpayers Etc., 26 Wash.2d 1, 7, 172 P.2d 591, 594 (1946). The quotation is frequently found in decisions resolving conflicts among the three branches of government. *See, e.g., Moses Lake Dist. v. Big Bend College*, 81 Wash.2d 551, 503 P.2d 86 (1972); *Yelle v. Bishop*, 55 Wash.2d 286, 347 P.2d 1081 (1959).

Where a direct conflict arises between the general authority of the legislature and the reserved power of the electorate, the difference between a "grant" and a "limitation" may not be so distinct. The plurality decision in *Ford v. Logan*, 79 Wash.2d 147, 483 P.2d 1247 (1971) is worth reading in this regard.

[11]Judicial notice, of which the court may take cognizance, is com-

Therein lies a unique dilemma. Defendants have posited no source materials of which this Court may take judicial notice except for certain materials of which are clearly outside the ambit of the Washington rule, *e.g.*, newspaper clippings; and reference to the history underlying the ill-fated Initiative 335 which tends to be somewhat less than conclusive on the issue.[12] Briefly stated, I have no basis upon which to read requisite supporting facts into HB 626 which are sorely lacking on its face. Having concluded that at least the burden of production, if not persuasion, in this area rests with the defendants, it would necessarily follow that the Act is constitutionally deficient as a matter of state law.

In the interest of preserving judicial federalism, however, I am hesitant to pass upon a question which is peculiarly local in nature and which is of such obvious importance to legitimate societal interests of the state. *See Lehman Brothers v. Schein*, 416 U.S. 386, 390-91, 94 S.Ct. 1741, 1743-44, 40 L.Ed.2d 215 (1974). In anticipation of this dilemma, defendants have suggested in argument that the validity of the emergency clause be determined by the Washington Supreme Court pursuant to the Federal Court

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posed of facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty. The court may "... resort to encyclopedias, authoritative works upon the subject, reports of committees, scientific bodies, and any source of information that is generally considered accurate and reliable ...."

State ex rel. Humiston v. Meyers, 61 Wash.2d 772, 779, 380 P.2d 735, 739-40 (1963). *See also Tyler Pipe Indus. v. Dept. of Revenue*, 96 Wash.2d 785, 796, 638 P.2d 1213, 1218 (1982).

[12]The Initiative was passed by the voters on November 8, 1977 and subsequently struck down as unconstitutional in *Spokane Arcades v. Ray*, 449 F.Supp. 1145 (E.D.Wn.1978), *aff'd sub nom. Spokane Arcades v. Brockett*, 631 F.2d 135 (9th Cir. 1980), *aff'd* 454 U.S. 1022, 102 S.Ct. 557, 70 L.Ed.2d 468 (1981). Defendants ask this Court to take notice of the history of this measure as evidence of long standing state interest in the field of pornography and the need for decisive action upon exhaustion of the appellate process.

This position is not without merit, but in and of itself is insufficient to compensate for the dearth of underlying facts on the face of the Act.

Local Law Certificate Procedure Act codified at R.C.W. ch. 2.60. The relevant statute is as follows:

> When in the opinion of any federal court below (sic) whom a proceeding is pending, it is necessary to ascertain the local law of this state in order to dispose of such proceeding *and the local law has not been clearly determined,* such federal court may certify to the supreme court for answer the question of local law involved and the supreme court shall render its opinion in answer thereto.

R.C.W. 2.60.020 (emphasis added).

In the interests of economy as well as efficacious and final resolution, the certification avenue, at first glance, appears inviting. Upon reflection, however, utilization of this statute would clearly be an impermissible short cut. The essential bar lies in the requirement that the local law be unsettled. *Id.; see also Estate of Madsen v. C. I. R.*, 659 F.2d 897, 899 (9th Cir. 1981).

[18] For reasons already given, I see nothing unsettled or uncertain about Washington's current analysis of the legal issue. The approaches embodied in *Humiston, supra* and *Harris, supra* are abundantly clear as to the prevailing judicial thought in Washington. Were this matter to be certified, therefore, the question placed before the State Supreme Court would not be one of law, as contemplated by the statute, but one of fact, *i.e.*, what facts are, or should be, available to the Court as a matter of judicial knowledge.[13] Should the state Supreme Court wish to assume the role of an original fact-finding body, that is well within its prerogative. *State ex rel. Distilled Spirits Inst. v. Kinnear*, 80 Wash.2d 175, 187, 492 P.2d 1012, 1019 (1972). I am not inclined however, to cast that Court into what may be an unwanted, unwarranted, and arguably inappropriate role.

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[13]Strictly speaking, such an inquiry would be a mixed question of fact and law reviewable as a question of law. *See Leschi v. Highway Comm'n*, 84 Wash.2d 271, 283-84, 525 P.2d 774, 783 (1974). Nonetheless, the Court would still be in a posture of seeking out and weighing external facts in an original capacity.

Faced with conflicting policy goals of proceeding to final resolution and allowing the state judiciary to chart its own position on a matter comprised solely of state questions free of outside interference, I defer to the latter. The litigants may yet reap the benefits of both of these goals by employing the Declaratory Judgments Act codified at R.C.W. ch. 7.24.

IV. CONCLUSION

In summary, I conclude that HB 626 satisfies constitutional criteria as a matter of federal law subject to the reservation that the right to trial by jury may not be infringed in civil prosecutions. Because I interpret legislative intent in drafting the bill as mandating the same result, I need not reach any issues concerning severability.

With respect to the question of whether inclusion of the emergency clause violates prescriptions of the Washington constitution, this is a matter best left to ultimate resolution by the state judiciary.

Accordingly, plaintiffs' prayer for injunctive relief is DENIED. An appropriate Order directing entry of judgment will follow.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED IN THE
U.S. DISTRICT COURT
Eastern District of Washington
APR 18, 1984
J. R. FALLQUIST, Clerk
_____ Deputy

J-R DISTRIBUTORS, INC., et al.,
Plaintiffs-Appellants,

vs.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,
Defendants-Appellees.

82-3441, 82-3442, 82-3500, 82-3501, 82-3502, 82-3503, 82-3504
No. _____

DC CV 82-230, 82-231, 82-240, 82-239, 82-354, 82-223, 82-283 RJM

APPEAL from the United States District Court for the Eastern District of Washington (Spokane).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington (Spokane) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the _____ judgment of the said District Court in this Cause be, and hereby is reversed.

Filed and entered February 06, 1984.

A TRUE COPY
ATTEST APR 16, 1984
PHILLIP B. WINBERRY
/s/ _____
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
APR 06, 1984
PHILLIP B WINBERRY
Clerk, U.S. Court of Appeals

NO. 82-3441

D.C. NO. CV 82-230
(Eastern District of Washington)

J-R DISTRIBUTORS, INC.
Plaintiff-Appellant,

vs.

KENNETH EIKENBERRY, etc., et al.,
Defendants-Appellees.

NO. 82-3442

D.C. NO. CV 82-231
(Eastern District, Washington)

AZURE ENTERTAINMENT CORPORATION OF WASHINGTON,
Plaintiff-Appellant,

vs.

KENNETH EIKENBERRY, etc., et al.,
Defendants-Appellees.

NO. 82-3500

D.C. NO. CV 82-240
(Eastern District, Washington)

JACK R. BURNS, etc.,
Plaintiff-Appellant,

vs.

THE HONORABLE KENNETH EIKENBERRY, etc.,
Defendant-Appellee.

NO. 82-3501

D.C. NO. CV 82-239
(Eastern District, Washington)

PLAYTIME THEATERS, INC., etc.,

Plaintiff-Appellant,

VS.

THE HONORABLE KENNETH EIKENBERRY, etc., et al.,

Defendants-Appellees.

NO. 82-3502

D.C. NO. CV 82-354
(Eastern District, Washington)

KUKIO BAY PROPERTIES, INC., etc.,

Plaintiff-Appellant,

VS.

NORM MALENG, etc.,

Defendant-Appellee.

NO. 82-3503

D.C. NO. CV 82-223
(Eastern District, Washington)

SPOKANE ARCADES, INC., etc.,

Plaintiff-Appellant,

VS.

THE HONORABLE KENNETH EIKENBERRY, etc., et al.,

Defendants-Appellees.

NO. 82-3504

D.C. NO. CV 82-283
(Eastern District, Washington)

THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, et al.,

Plaintiff-Appellants,

VS.

THE HONORABLE KENNETH EIKENBERRY, etc.,

Defendant-Appellee.

ORDER

Before: GOODWIN, WALLACE, and REINHARDT, Circuit Judges.

Judges Goodwin and Reinhardt have voted to deny the pet .on for rehearing, and Judge Wallace has voted to grant the petition for rehearing. The panel has unanimously voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUN 21, 1984
PHILLIP B WINBERRY
Clerk, U.S. Court of Appeals

NO. 82-3441
D.C. NO. CV 82-230

J-R DISTRIBUTORS, INC.,

Plaintiff-Appellant,

VS.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington, JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington, JEFFREY C. SULLIVAN, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington, and FRED ANDREWS, in his official capacity as City Attorney for the City of Yakima, Washington,

Defendants-Appellees.

NO. 82-3442
D.C. NO. CV 82-231

AZURE ENTERTAINMENT CORPORATION OF WASHINGTON,

Plaintiff-Appellant,

VS.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington; and JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington,

Defendants-Appellees.

NO. 82-3500
D.C. NO. CV 82-240

JACK R. BURNS, in his representative capacity as EXECUTOR OF THE ESTATE OF SELOM F. BURNS,
Plaintiff-Appellant,

vs.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only,
Defendant-Appellee.

NO. 82-3501
D.C. NO. CV 82-239

PLAYTIME THEATRES, INC., a Washington Corporation,
Plaintiff-Appellant,

vs.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity, only, DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only, and JAMES SLOANE, Spokane City Attorney, in his representative capacity only, NORM MALENG, Prosecuting Attorney of King County in his representative capacity only,
Defendants-Appellees.

NO. 82-3502
D.C. NO. CV 82-354

KUKIO BAY PROPERTIES, INC., a Washington Corporation,
Plaintiff-Appellant,

vs.

NORM MALENG, Prosecuting Attorney of King County, in his representative capacity only,
Defendant-Appellee.

NO. 82-3503
D.C. NO. CV 82-223

SPOKANE ARCADES, INC., a Washington Corporation,
Plaintiff-Appellant,

vs.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only, DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only, and JAMES SLOANE, Spokane City Attorney, in his representative capacity only,

Defendants-Appellees.

NO. 82-3504
D.C. NO. CV 82-283

THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON; MADRONA PUBLISHERS, INC., SUPERIOR PUBLISHING COMPANY; WASHINGTON LIBRARY ASSOCIATION; PACIFIC NORTHWEST BOOKSELLERS ASSOCIATION; MOTION PICTURES EXHIBITORS OF WASHINGTON, ALASKA, AND NORTHERN IDAHO; WASHINGTON STATE COUNCIL OF TEACHERS OF ENGLISH; WASHINGTON LIBRARY MEDIA ASSOCIATION; and THE COMMUNITY COLLEGE LIBRARIAN and MEDIA SPECIALISTS ASSOCIATION OF WASHINGTON,
Plaintiffs-Appellants,

vs.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only,

Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Kenneth O. Eikenberry, in his official capacity as Attorney General for the State of Washington, the defendant-appellee above named, hereby appeals to the Supreme Court of the United States from the April 6, 1984 order denying petition for rehearing of the 2-1 opinion reversing the decision of the United States District Court for the Western District of Washington. The decision of the District Court held the challenged Washington State statute to be constitutional.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DATED this 19th day of June, 1984.

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Attorney General

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOS. 82-3441, 82-3442
& 82-3500 thru 82-3504

DC# CV 82-230 RJM

J-R DISTRIBUTORS, INC., et al.,

Plaintiffs-Appellants,

vs.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Defendants-Appellees.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal to the Supreme Court of the United States has been served upon counsel by placing the same in the United States mail, postage prepaid, properly addressed this 18th day of June, 1984, to:

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUN 25 1984
PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

NO. 82-3441
D.C. NO. CV 82-230

J-R DISTRIBUTORS, INC.,

Plaintiff-Appellant,

VS.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington, JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington, JEFFREY C. SULLIVAN, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington, and FRED ANDREWS, in his official capacity as City Attorney for the City of Yakima, Washington,

Defendants-Appellees.

NO. 82-3442
D.C. NO. CV 82-231

AZURE ENTERTAINMENT CORPORATION OF WASHINGTON,

Plaintiff-Appellant,

VS.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington; and JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington,

Defendants-Appellees.

NO. 82-3500
D.C. NO. CV 82-240

JACK R. BURNS, in his representative capacity as EXECUTOR OF THE ESTATE OF SELOM F. BURNS,

Plaintiff-Appellant,

vs.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only,

Defendant-Appellee.

NO. 82-3501
D.C. NO. CV 82-239

PLAYTIME THEATRES, INC., a Washington Corporation,

Plaintiff-Appellant,

vs.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity, only, DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only, and JAMES SLOANE, Spokane City Attorney, in his representative capacity only, NORM MALENG, Prosecuting Attorney of King County in his representative capacity only,

Defendants-Appellees.

NO. 82-3502
D.C. NO. CV 82-354

KUKIO BAY PROPERTIES, INC., a Washington Corporation,

Plaintiff-Appellant,

vs.

NORM MALENG, Prosecuting Attorney of King County, in his representative capacity only,

Defendant-Appellee.

F-3

NO. 82-3503
D.C. NO. CV 82-223

SPOKANE ARCADES, INC., a Washington Corporation,
Plaintiff-Appellant,

vs.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only, DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only, and JAMES SLOANE, Spokane City Attorney, in his representative capacity only,

Defendants-Appellees.

NO. 82-3504
D.C. NO. CV 82-283

THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON; MADRONA PUBLISHERS, INC., SUPERIOR PUBLISHING COMPANY; WASHINGTON LIBRARY ASSOCIATION; PACIFIC NORTHWEST BOOKSELLERS ASSOCIATION; MOTION PICTURES EXHIBITORS OF WASHINGTON, ALASKA, AND NORTHERN IDAHO; WASHINGTON STATE COUNCIL OF TEACHERS OF ENGLISH; WASHINGTON LIBRARY MEDIA ASSOCIATION; and THE COMMUNITY COLLEGE LIBRARIAN and MEDIA SPECIALISTS ASSOCIATION OF WASHINGTON,
Plaintiff-Appellants,

vs.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only,

Defendant-Appellee.

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Kenneth O. Eikenberry, in his official capacity as Attorney General for the State of Washington, the defendant-appellee above named, hereby appeals to the Supreme Court of the United States from the April 6, 1984 order denying petition for rehearing of the 2-1 opinion reversing the decision of the United States District Court for the Eastern District of Washington. The decision of the District Court held the challenged anti-obscenity Washington State statute to be constitutional.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DATED this 22nd day of June, 1984.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOS. 82-3441, 82-3442
& 82-3500 thru 82-3504

DC# CV 82-230 RJM

J-R DISTRIBUTORS, INC., et al.,

Plaintiffs-Appellants,

vs.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Defendants-Appellees.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Amended Notice of Appeal to the Supreme Court of the United States has been served upon counsel by placing the same in the United States mail, postage prepaid, propery addressed this 22nd day of June, 1984, to:

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Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Section 1. The definitions set forth in this section shall apply throughout this chapter.

(1) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual or violent conduct which appears in the lewd matter, or knowledge of the acts of lewdness or prostitution which occur on the premises.

(2) "Lewd matter" is synonymous with "obscene matter" and means any matter:

(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which explicitly depicts or describes patently offensive representations or descriptions of:

(i) Ultimate sexual acts, normal or perverted, actual or simulated; or

(ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or

(iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

(c) Which, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value.

(3) "Lewdness" shall have and include all those meanings which are assigned to it under the common law.

(4) "Matter" shall mean a motion picture film or a publication or both.

(5) "Motion picture film" shall include any:

(a) Film or plate negative;

(b) Film or plate positive;

(c) Film designed to be projected on a screen for exhibition;

(d) Film, glass slides, or transparencies, either in negative or positive form, designed for exhibition by projection on a screen;

(e) Video tape or any other medium used to electronically reproduce images on a screen.

(6) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(7) "Place" includes, but is not limited to, any building, structure, or places, or any separate part or portion thereof, whether permanent or not, or the ground itself.

(8) "Prurient" means that which incites lasciviousness or lust.

(9) "Publication" shall include any book, magazine, article, pamphlet, writing, printing, illustration, picture, sound recording, or coin-operated machine.

(10) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer of possession of, lewd matter.

NEW SECTION. Sec. 2. The following are declared to be moral nuisances:

(1) Any and every place in the state where lewd films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition;

(2) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a moral nuisance under this section;

(3) Any and every place of business in the state in which lewd publications constitute a principal part of the stock in trade;

(4) Every place which, as a regular course of business, is used for the purpose of lewdness or prostitution, and every such place in or upon which acts of lewdness or prostitution are conducted, permitted, carried on, continued, or exist.

NEW SECTION. Sec. 3. Any of the following parties may bring a civil action in the superior court of any county where a moral nuisance is alleged to have been maintained:

(1) The prosecuting attorney for the county where the alleged moral nuisance is located;

(2) The city attorney for the city where the alleged moral nuisance is located; or

(3) The attorney general.

The rules of evidence, burden of proof, and all other rules of court shall be the court rules generally applicable to civil cases in this state: PROVIDED, That the standard of proof on the issue of obscenity shall be clear, cogent, and convincing evidence.

NEW SECTION. Sec. 4. (1) No person shall with knowledge maintain a moral nuisance.

(2) Upon a determination that a defendant has with knowledge maintained a moral nuisance, the court shall impose a civil penalty and judgment of an amount as the court may determine to be appropriate. In imposing the civil penalty, the court shall consider the wilfulness of the defendant's conduct and the profits made by the defendant attributable to the moral nuisance.

NEW SECTION. Sec. 5. All civil penalties assessed under section 4 of this act shall be paid into the general treasury of the governmental unit commencing the civil action.

NEW SECTION. Sec. 6. Nothing in this chapter applies to the circulation of any material by any recognized historical society or museum, any library of any college or university, or to any archive or library under the supervision and control of the state, county, municipality, or other political subdivision.

NEW SECTION. Sec. 7. Sections 1 through 6 of this act shall constitute a new chapter in Title 7 RCW.

NEW SECTION. Sec. 8. This is added to chapter 9.68 RCW a new section to read as follows:

A person who, for profit-making purposes and with knowledge, sells, exhibits, displays, or produces any lewd matter as defined in section 1 of this act is guilty of promoting pornography. Promoting pornography is a class C felony and shall bear the punishment prescribed for that class of felony, except that upon conviction of promoting pornography the court shall impose a fine of not less than

five thousand dollars per count nor more than fifty thousand dollars per count. In imposing the criminal penalty, the court shall consider the wilfulness of the defendant's conduct and the profits made by the defendant attributable to the felony. All fines assessed under this chapter shall be paid into the general treasury of the state.

NEW SECTION. Sec. 9. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 10. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Office-Supreme Court, U.S.
FILED
AUG 9 1984
ALEXANDER L. STEVAS,
CLERK

(3) (2)

Nos. 84-28 and 84-143

In The

Supreme Court of the United States

October Term, 1984

No. 84-28

DONALD C. BROCKETT,

Appellant,

vs.

SPOKANE ARCADES, INC., et al.,

Appellees.

No. 84-143

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Appellants,

vs.

J-R DISTRIBUTORS, INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

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PARTIES

Appellants: KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington, JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington, JEFFREY C. SULLIVAN, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington, FRED ANDREWS, in his official capacity as City Attorney for the City of Yakima, Washington, NORM MALENG, Prosecuting Attorney of King County in his representative capacity only.

Appellees: J-R DISTRIBUTORS, INC.; AZURE ENTERTAINMENT CORPORATION OF WASHINGTON; JACK R. BURNS, in his representative capacity as EXECUTOR OF THE ESTATE OF SELOM F. BURNS; PLAYTIME THEATRES, INC., a Washington Corporation; KUKIO BAY PROPERTIES, INC., a Washington Corporation; SPOKANE ARCADES, INC., a Washington Corporation; THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON; MADRONA PUBLISHERS, INC., SUPERIOR PUBLISHING COMPANY; WASHINGTON LIBRARY ASSOCIATION; PACIFIC NORTHWEST BOOKSELLERS ASSOCIATION; MOTION PICTURES EXHIBITORS OF WASHINGTON, ALASKA, AND NORTHERN IDAHO; WASHINGTON STATE COUNCIL OF TEACHERS OF ENGLISH; WASHINGTON LIBRARY MEDIA ASSOCIATION; and THE COMMUNITY COLLEGE LIBRARIAN and MEDIA SPECIALISTS ASSOCIATION OF WASHINGTON.

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Nos. 84-28 and 84-143

In The

Supreme Court of the United States

October Term, 1984

No. 84-28

DONALD C. BROCKETT,

Appellant,

vs.

SPOKANE ARCADES, INC., et al.,

Appellees.

No. 84-143

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Appellants,

vs.

J-R DISTRIBUTORS, INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

Appellees* respectfully move to affirm the judgment of the United States Court of Appeals for the Ninth Circuit in these cases. Supreme Court Rules 16.1(c) and (d).

*This motion is brought on behalf of all Appellees named in the listing of "Parties", *supra*.

Additionally, appellee J-R Distributors, Inc., alone, respectfully moves to dismiss the appeals [in Docket No. 84-143] of appellants JEFFREY C. SULLIVAN, Prosecuting Attorney for the County of Yakima, State of Washington, and FRED ANDREWS, City Attorney for the City of Yakima, State of Washington, on the ground that they failed to file a timely Notice of Appeal. Supreme Court Rule 16.1(a). This Motion to Dismiss as to appellants SULLIVAN and ANDREWS is based upon the fact that their Notice of Appeal was not filed in the Ninth Circuit Court of Appeals until July 9, 1984, 94 days after the date on which the Ninth Circuit denied their petition for rehearing en banc. *See,* Supreme Court Rules 11.2, 11.3, 11.4 and 28 U.S.C. § 2101(c).

THE ISSUES PRESENTED ARE INSUBSTANTIAL

A. Prurient Interest

In *Miller v. California,* 413 U.S. 15, (1973), a majority of this Court, after wrestling with "the intractable problem of obscenity" for sixteen years, finally agreed on a constitutionally based definition of obscenity intended to bring uniformity and stability to what had been a confusingly amorphous area of the law. The singular achievement of this opinion was that it brought uniformity and a semblance of notice to those involved in presumptively protected sexually oriented speech by demarcating a legislative-like line beyond which government could not go in

its efforts to proscribe sexually oriented speech.[1] At the same time, it put distributors on notice that materials beyond the boundaries of *Miller* could subject them to prosecutions in those states choosing to define "obscenity" as broadly as permitted by the Constitution.

In the aftermath of *Miller*, anti-obscenity legislation throughout the country was brought into conformity with *Miller* either by legislative action or judicial construction. The State of Washington was no exception. In *State v. J-R Distributors, Inc.*, 82 Wash.2d 584, 512 P.2d 1049 (Wash. 1973), *cert. den.* 418 U.S. 949, the Washington Supreme Court read the *Miller* test into Washington's previous obscenity statute. Under this judicial construction, Washington had (from 1973 until the legislation here at issue was passed in 1982) an enforceable criminal obscenity statute defining obscenity under *Miller's* three-part test, specifically requiring that material, taken as a whole, must appeal to a "prurient interest" in sex as judged by the average person applying contemporary standards.

After nine years of acquiescing in this unquestionably valid criminal obscenity statute, the Washington Legislature passed the statute at issue herein in which, *inter alia*, it rejected the prior statute's undefined use of "prurient interest" and then defined that phrase to include anything which incites, *inter alia*, mere "lust." R.C.W. § 7.48A.010(8).

At p. 6 of its Jurisdictional Statement, the Attorney General [appellant Eikenberry] argues that the Washing-

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[1] Appellees, along with many others, nonetheless continue to support the positions expressed by Justice Brennan [dissenting in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 70 (1973)] and Justice Stevens [dissenting in *Smith v. United States*, 431 U.S. 291, 311 (1977)].

ton Legislature was victimized by a "legal ambush" in that it was assertedly punished for its good faith attempts to follow this Court's pronouncements. Nothing could be further from the truth. For a nine year period the State had and utilized a statutory definition of obscenity which was perfectly acceptable under controlling Supreme Court authority. The State simply could have relied upon the statutorily undefined use of the term "prurient interest" and the accepted definition of that legal term of art.[2] Alternatively, the State could have expressly adopted the Model Penal Code's definition of "prurient interest" as a "shameful or morbid" interest in sex. Either approach would have guaranteed that the law would not have exceeded permissible constitutional boundaries. Instead, the State enacted a statute which permitted a finding of obscenity which, with respect to prurience, was predicated exclusively on the material's appeal to no more than a normal and healthy "lustful" interest in sex.

In *Roth v. United States*, 354 U.S. 476, 487 (1957), this Court held that "sex and obscenity are not synonomous." The thrust of that statement in *Roth* was that sexually oriented speech appealing to a normal and healthy interest in sex (as viewed by the average person) could not constitutionally be prohibited whereas sexually oriented speech which appealed to an unhealthy or shameful or morbid interest (as viewed by the average person) *could* be prohibited by appropriately drafted legislation.

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[2] *See, Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1026 (5th Cir. 1981), *cert. den. sub nom Theatres West Inc. v. Holmes*, 455 U.S. 913 (1982).

In holding the statutory definition unconstitutional in this case, the Ninth Circuit[3] acted consistently with every federal court and the vast majority of state courts which have considered this issue. *See,* e.g., *United States v 35mm. Motion Picture Film Entitled "Language of Love,"* 432 F.2d 705, 711-712 (2nd Cir. 1970) [where the Second Circuit concluded that this Court, in using the term "prurient interest," "never intended to brand as 'obscene' representations of sexual matters which do not import a debasing, 'shameful or morbid' quality into the expression or depiction of human sexuality"]; *Penthouse International, Ltd. v. McAuliffe,* 610 F.2d 1353, 1363-1364 (5th Cir. 1980) [interpreting *Roth* and *Miller* as adopting the A.L.I. Model Penal Code definition of "prurient interest" as a "shameful or morbid interest in nudity, sex or excretion."]; *Red Bluff Drive-In, Inc. v. Vance,* 648 F.2d 1020, 1026 (5th Cir. 1981) [sustaining against constitutional challenge a Texas statute using the term "prurient interest" without further definition but, nonetheless agreeing that that term in fact "means shameful and morbid"]; *Goldstein v. Allain,* 568 F.Supp. 1377, 1385-1386 (N.D. Miss. 1983) [preliminary injunction issued enjoining enforcement of new Mississippi obscenity statute defining "prurient interest," *inter alia,* as simply a "lustful" or "erotic" interest]; *Community Television of Utah v. Roy City,* 555 F.Supp. 1164, 1169, n. 23 (D.Utah 1982) [distinguishing between the term "prurient interest" used in *Miller* and the term "arousing sexual interest" used in the ordinance stricken in that case]; *Little Store, Inc. v. State of Maryland,* 453 A.2d 1215 (Md.

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[3] Rehearing *en banc* was denied unanimously by the Ninth Circuit. See the Appendix to appellant Eikenberry's Jurisdictional Statement at D-3.

1983) [reversing an obscenity conviction where the trial court's jury instructions defined "prurient" as a "tendency to excite [a] normal lustful interest in sex", *id.* at 1217]; *Leech v. American Booksellers Ass'n., Inc.,* 582 S.W.2d 738, 749-750 (Tenn. 1979) [concluding that *Roth* and *Miller, supra,* used the term "prurient interest" with reference to an interest in sex which was considered either "shameful or morbid"]; *State of Kansas v. The Great American Theatre Co.,* 227 Kan. 633, 608 P.2d 951 (1980) [where the Kansas Supreme Court, in rejecting the State's proposed jury instruction which would have defined prurient interest exclusively as "an appeal to sexual desire" concluded that this Court "meant something more than merely an appeal to sexual desires when it discussed the element of prurient appeal," *id.* at 640]; and *Andrews v. State of Texas,* 652 S.W.2d 370, 389 (Tex.Cr.App. 1983) [concluding that a properly instructed jury in Texas—where the statutory term "prurient interest" is otherwise undefined—would have to make a finding that the material appeals to "such a shameful or morbid interest in sex as to be prurient," *id.* at 389].

Similarly, the Ninth Circuit's ruling was also consistent with the historical conception of obscenity as "the present critical point in the compromise between candor and *shame* at which the community may have arrived here and now." [Emphasis added], *United States v. Kennerley,* 209 F. 119, 121 (S.D.N.Y. 1913) (L. Hand, J.). *See also,* e.g., the concurring opinion of Justice Harlan in *Smith v. California,* 361 U.S. 147, 171, n. 2 (1959) and *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102,* 709 F.2d 132, 137 (2nd Cir. 1983).

Similarly, the Ninth Circuit's ruling was consistent with every ALI Model Penal Code definition of obscenity which has been in existence since *Roth*. The ALI standard is particularly significant because, at the conclusion of fn. 20 in *Roth*, 354 U.S. at 487, this Court referred to the comments at pp. 10 and 29 of Tentative Draft No. 6 to the 1957 version of the portion of the Model Penal Code defining obscenity. At p. 10 of that draft, the American Law Institute stated:

> "Obscenity is defined in terms of material which appeals predominantly to prurient interest in sexual matters . . . . *We reject the prevailing test of tendency to arouse lustful thoughts or desires* because it is unrealisticly broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising and art . . . . * * * On the other hand, 'appeal to prurient interest' refers to qualities of the material itself: the capacity to attract individuals eager for a forbidden look behind the curtain of privacy which our customs draw about sexual matters." (Emphasis added.) ALI Model Penal Code, § 207.10 (Tent.Draft No. 6, 1957), comment at 10.

The referred-to language at p. 29 of the comments was even more specific:

> "In specifying that the appeal must be to *prurient* interest, the proposed definition recognizes that there is a normal interest in sexual matters, for which it should be lawful to provide satisfaction through works of art as well as scientific and educational writings. The prurient interest is an *exacerbated, morbid, or perverted interest* . . . ." [Emphasis in original.] ALI Model Penal Code, § 207.10 (Tent.Draft No. 6, 1957), comment at 29.

The Ninth Circuit's ruling is similarly consistent with fn. 2 of this Court's opinion in *Miller v. California, supra,*

where, at the end of the footnote, this Court refers to the definition of obscenity contained in the 1962 Official Draft of the ALI Model Penal Code. That definition provided:

> "§ 251.4 Obscenity
>
> (1) *Obscene Defined.* Material is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, *a shameful or morbid interest*, in nudity, sex or excretion . . . ." (Emphasis added), ALI Model Penal Code § 251.41(1) (Official Draft, 1962).

Nowhere in *Miller* is *Roth's* fn. 20 mentioned, nor is any definition of "prurient interest" other than that of the ALI.

The Ninth Circuit's determination that a "prurient" interest is not the same as simple "lust" is also supported by the statutes of a vast majority of the 50 states. While many state statutes define a "prurient interest" specifically as a "shameful or morbid" interest,[4] the majority of states simply employ the term "prurient interest" and leave it otherwise undefined.[5]

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[4] See, e.g., Cal. Penal Code § 311(a); Fla. Stats. Ann. § 847.07(2)(a); Code of Ga. Ann. § 26-2101(b)(1) [but see *Spry* v. *State*, 156 Ga.App. 74, 274 S.E.2d 2, 5 (1980) purporting to permit a jury instruction simply using the term "lust"]; Idaho Code § 18-4101(B); Ill. Ann. Stats. Chapt. 38, § 11-20(b); Code of Laws of S.C. § 16-15-260(b); S.D. Codified Laws § 22-24-27(12); Tenn. Code Ann. § 39-6-1101(8) and Code of Va. § 18.2-372.

[5] Unless otherwise noted, all of the following states have obscenity statutes which utilize the phrase "prurient interest" but do not otherwise further define it: Code of Ala. § 13A-12-150(1)(a); Ariz. Rev. Stats. § 13-3501-2(a); Ark. Stats. § 41-3585.1(4)(b); Colo. Rev. Stats. § 18-7-101(2)(a); Conn. Gen. Stats. Ann. § 53a-193(a); Del. Code Ann. Title 11 § 1364(1);

(Continued on next page)

Of the 50 states, only 5 supply specific definitions of the term "prurient interest" not expressly requiring a finding of a "shameful or morbid" interest.[6] Of these 5 states, only two permit a finding of "prurient interest"

(Continued from previous page)

Hawaii Rev. Stats. § 712-1210(6) (a); Ind. Stats. Ann. § 35-49-2-1(1); Iowa Code Ann. Vol. 55 § 728.4; Kan. Stats. Ann. § 21-4301(2) (a); Ken. Rev. Stats. § 531.010(3) (a); La. Stats. Ann. § 14:106A(3); Maine Rev. Stats. Ann. Title 17 § 2912-2B(1); Ann. Code of Md. Art. 27, § 418 [note: this statute simply uses the word "obscene" but was construed (in *Little Store, Inc. v. State*, 453 A.2d 1215 (Md. 1983)) to require proof of a shameful or morbid interest rather than a mere "lustful interest"]; Mass. Gen. Laws Ann. Chapter 272 § 31; Minn. Stats. Ann. § 617.241(1) (a); Ann. Mo. Stats. § 573.010(1) (a); Mont. Code Ann. § 45-8-201(2) (b) (i); Rev. Stats. of Neb. § 28-807(9) (a) [note: this statute uses the phrase "appeals to the prurient interest or a shameful or morbid interest in nudity, sex or excretion"]; Nev. Rev. Stats. § 201.235-4(a); N.J. Stats. Ann. § 2C: 34-2-a(1) (c); N.M. Stats. § 30-38-1-B(1); N.Y. Penal Law § 235. 00-1(a); Gen. Stats. of N.C. § 14-190.1(b) (2); N.D. Century Code § 12.1-27.1-01-4-a; Okla. Stats. Ann. Title 21 § 1024.1-1 and -2 (c); Ore. Rev. Stats. § 167.087(2) (b); Pa. Consol. Stats. Ann. Title 18 § 5903(b); Gen. Laws of R.I. § 11-31-1; Tex. Codes Ann. Title 9 § 43.21(a) (1) (A); Utah Code Ann. § 76-10-1203 (1) (a); Vt. Stats. Ann. § 2801(6) (A) [note: this statute only prohibits dissemination of matter "harmful to minors" and, in that context, refers to material which "appeals to the prurient, shameful or morbid interest of minors"]; W.Va. Code § 61-8A-1(7) (a); Wis. Stats. Ann. § 944.21(1) (a); [note: this statute simply uses the word "obscene" with no further definition; however, it was held unconstitutional and unenforceable by the Wisconsin Supreme Court in *State v. Princess Cinema of Milwaukee, Inc.*, 96 Wis.2d 646, 292 N.W.2d 807 (Wis. 1980)]; Wy. Stats. § 6-4-301(a)-(iii) (A).

[6] *See*, e.g., Michigan Statutes Annotated § 28.575(1) and (2); Mississippi Code Annotated § 97-29-103(1) (a); New Hampshire Revised Statutes Annotated Chapter 650:1-IV(a); Ohio Revised Code Annotated § 2907.01(F) (1-5); and Revised Code of Washington Annotated § 7.48A.010(8).

based upon a simple showing of "lust", [7] i.e. Washington and Mississippi. [As mentioned previously, the statutes of both of these two states have been stricken by federal courts due to their overly broad definitions of "pruri-

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[7] In *State* v. *Burgun*, 56 Ohio St.2d 354, 384 N.E.2d 255, 261 (Ohio 1978), the Ohio Supreme Court specifically held that, before material could be found obscene, it must not only meet the rather complex *statutory* definition of obscenity, but, *in addition*, it must meet the three-part test of *Miller*. Pursuant to the authoritative construction rendered in that case, an Ohio jury must now make a finding that the material appealed to a "prurient interest," and there is no further specific definition which would limit that interest to a simple "lustful" interest. Indeed, even the prior statute required something in addition to simple lust before the requisite finding could be made.

In *People* v. *Neumayer*, 405 Mich. 341, 275 N.W.2d 230 (Mich. 1979), the Michigan Supreme Court simply *replaced* their prior obscenity statute with the familiar three-part *Miller* test. However, even under the prior statute, it was not clear that a simple showing of "lust" would suffice.

The New Hampshire statute, *supra*, simply defines a "prurient interest" as "an interest in lewdness or lascivious thoughts." This definition at least implies some aspect of unwholesomeness beyond mere erotic or lustful appeal.

Both the Attorney General's Jurisdictional Statement (at p. 11) and Judge Wallace's dissent in the Ninth Circuit's opinion herein [see p. A-37 of Appendix "A" attached to the Jurisdictional Statement filed by the Attorney General in this case] state that Nebraska's statute defines "prurient interest" as the excitation of "lustful thoughts." However, subsequent to the 1964 statute quoted by Judge Wallace and the Attorney General, the Nebraska Legislature specifically *changed* the definition of "prurient interest" to eliminate any reference to "lustful thoughts" or "lust." Under the new statute, Neb. Rev. Stat. § 28-807(9), the statute refers to material which "appeals to the prurient interest or a shameful or morbid interest in nudity, sex or excretion. . . ."

ent interest", both of which defined the phrase in terms of mere "lust."[8]]

The insubstantiality of the issue raised by the State of Washington is additionally evidenced by the fact that appellants *conceded* at the District Court level that "the term 'prurient interest' has become a 'term of art' or a shorthand for a 'shameful or morbid interest in sex, nudity or excretion.' "[9]

Additionally, at least at one point in this case, appellants argued that it was the Legislature's *intent* that the term "prurient interest" was the equivalent of a "shameful or morbid" interest.[10]

For these reasons, it is respectfully submitted that the issue presented in the Jurisdictional Statement is so insubstantial as not to require plenary review by this Court.

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[8] The present case, of course, involves the striking of the Washington statute. In *Goldstein v. Allain, supra,* 568 F.Supp. 1377, 1385-1386 (N.D.Miss. 1983), the court issued a preliminary injunction against enforcement of the Mississippi statute. That case is presently on appeal.

[9] This statement appears at p. 6, lns. 4-6 of a document entitled "CONSOLIDATED MEMORANDUM OF AUTHORITIES IN OPPOSITION TO PLAINTIFF'S COMPLAINTS FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF" filed by Appellant Sloane, counsel for the City of Spokane. This document was filed in the District Court on May 18, 1982 and p. 11 of this document appears in the Ninth Circuit's Consolidated Excerpt of Record at p. 100. The Sloane memorandum was expressly adopted by appellant Brockett (see p. 133 of the Consolidated Excerpt of Record filed in the Ninth Circuit) and appears to have been adopted by the Attorney General as well. See p. 119 of the Consolidated Excerpt of Record, lns. 9-13.

[10] At p. 100 of the Consolidated Excerpt of Record, lns. 15-18, appellant Sloane stated:

> "Reading the entire statute, it becomes patently clear that the legislature intended to prohibit the sale and/or display of materials, intended to appeal to the 'shameful or morbid interest' in sex, nudity or excretion."

B. Overbreadth Standing

The jurisdictional statements do not raise any substantial federal question concerning appellees' standing to bring a facial attack challenging the overbreadth inherent in Washington's statutory definition of "obscenity."

In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), this Court held that a facial overbreadth challenge to a statute was permissible only where the overbreadth is "substantial . . . judged in relation to the statute's plainly legitimate sweep." 413 U.S. at 615. Accordingly, if a statute would be overbroad only in a small number of its applications, such overbreadth might not be sufficiently substantial to justify a facial challenge.

By contrast, the present case involves a situation where, due to a significant defect in the very definition of the term "obscenity," the statute will necessarily be overbroad in every case which arises under it. In every such case, jurors will be instructed pursuant to a definition which goes beyond that which the states are constitutionally empowered to impose. Additionally, well before a determination must be made by triers of fact, distributors of sexually oriented material, police, prosecutors and judges will all be required to make decisions based on the overbroad definition. These circumstances surely support a facial overbreadth challenge. *See*, e.g. this Court's recent discussions of First Amendment—overbreadth standing in the cases of *Village of Hoffman Estates v. Flipside*, — U.S. —, 102 S.Ct. 1186, 1191 (1982) ["a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct," 102 S.Ct. at 1191; *see also* n. 6 *id.*]; *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*,

52 U.S.L.W. 4594, 4597, n. 19 (1984) ["where the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack," *id.*]; and *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 52 U.S.L.W. 4875, 4878 (1984) ["use of overbreadth analysis reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted," *id.* at n. 7].

C. Pullman Abstention

The jurisdictional statements also fail to raise any significant claim that "*Pullman*"[11] abstention should have been invoked by the Ninth Circuit.

The procedural facts in this case are simple. The State of Washington previously had in effect a valid criminal obscenity statute which, by judicial construction, expressly adopted *Miller's* three-part test for obscenity. Under that test, the term "prurient interest" was undefined. In enacting the present legislation in 1982, the Legislature intentionally rejected the option of leaving the term "prurient interest" undefined as in the prior statute and also rejected adopting the Model Penal Code definition approved in both *Roth* and *Miller*. Instead, the Legislature, in R.C.W. § 7.48A.010(8), expressly and *exclusively* defined the word "prurient" as "that which incites lasciviousness *or lust*." (Emphasis added.) In so doing, the

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[11] *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

Legislature in unambiguous terms broadened its statutory net by insuring that the elements of "shamefulness" or "morbidity" or similar terms would play no part in the statutory definition.

In light of this clear legislative intent, the only way a state court could save the statute would be by finding the existing definitions unconstitutional and substituting, in their place, a definition consistent with the Constitution's requirements. These are precisely the types of circumstances where this Court very recently held (in a non-First Amendment context) that *Pullman* abstention should not be required. *Hawaii Housing Authority v. Midkiff*, 52 U.S.L.W. 4673, 4675 (1984). The First Amendment considerations herein make this case even *less* appropriate for *Pullman* abstention.

In *Hawaii Housing Authority, supra,* this Court rejected a *Pullman* abstention argument under circumstances where, as here, the legislative intent was clear and the statute was not otherwise complicated by ambiguous language. While acknowledging that the possibilities of a state court construction "*always* exist" (emphasis added), this Court pointed out that the relevant inquiry is whether "the statute is of an uncertain nature. . . ." *Id.* Under that test, *Pullman* abstention is clearly not required herein because the Washington statutory denition is simple, clear and precise.

In essence, what appellants seek is a ruling from this Court that pre-enforcement constitutional challenges to state statutes must initially be brought in the state courts to give them a "first look." However, this "first look" doc-

trine has consistently been rejected by this Court whenever it has been considered.[12] In *Brockett v. Spokane Arcades, Inc.*, 454 U.S. 1022 (1981), a pre-enforcement challenge to a predecessor Washington obscenity-nuisance statute, a 6-3 majority of this Court rejected the dissent's suggestion that state courts be given the "initial opportunity to consider the scope and validity of state statutes." 454 U.S. at 1023. Similarly, in *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308 (1980), in another pre-enforcement challenge, this Court struck down a Texas obscenity-nuisance abatement statute and rejected a dissenting opinion that the Texas courts be given "an opportunity to interpret

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[12] *See*, e.g., *Monroe v. Pape*, 365 U.S. 167, 183 (1961) ["It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy. . . ."]; *McNeese v. Board of Education*, 373 U.S. 668, 672 (1963) [holding that the purposes of the Civil Rights Act would be defeated "if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court"]; *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415-416 (1964) ["the right of a party plaintiff to choose a federal court where there is a choice cannot be properly denied. (Citation omitted.) Nor does anything in the abstention doctrine require or support such a result. * * * [The abstention doctrine's] recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law." *id.* at 415-416]; *Zwickler v. Koota*, 389 U.S. 241, 248-252 (1967) [holding that the above-described principles of *McNeese*, *supra*, and *England*, *supra*, have "particular significance when . . . the attack upon the statute on its face is for repugnancy to the First Amendment" *id.* at 251]; and *Town of Lockport v. Citizens for Community Action*, 430 U.S. 259, 264, n. 8 (1977) [holding that "principles of comity and federalism do not require that a federal court abandon jurisdiction it has properly acquired simply because a similar suit is later filed in a state court"].

Texas law" before such law is facially stricken by the federal courts. 455 U.S. at 319.[13]

Finally, the Attorney General argues that, by entertaining a pre-enforcement challenge to the statute, the federal courts deprive the State of Washington of any opportunity to obtain a narrowing construction of the statute. This is simply not so. A governmental defendant can always return to a federal court for modication of an injunction, whether interim or permanent, following a ruling by a state court which construes the enjoined statute in a manner so as to preserve its constitutionality.

In *Dombrowski v. Pfister,* 380 U.S. 479, 491 (1965), this Court, after recognizing the entitlement of the federal plaintiff to an injunction against enforcement of a state statute, held that the state, even after final injunctive relief, had the option of seeking a permissible narrowing construction of the statute in a non-criminal state court proceeding, after which it could return to the federal court for a modification of that court's injunctive order. *See,*

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[13] In addition to the reasons given by this Court in the cases cited at n. 12, *supra,* for rejection of the "first look" doctrine, perhaps the most compelling reason for rejection of the "first look" doctrine is this Court's recent rulings in *Allen v. McCurry,* 449 U.S. 90 (1980) and *Migra v. Warren City School District Bd. of Ed.,* — U.S. —, 104 S.Ct. 892 (1984) giving full collateral estoppel effect to state court determinations of federal constitutional issues, barring their relitigation in federal actions brought under the Federal Civil Rights Act. In light of these rulings, it is readily apparent that the "first look" doctrine has now become the "only look" doctrine except, of course, to the extent that appellate or certiorari review is always theoretically available in this Court. However, in *England, supra,* this Court specifically *rejected* the argument that the possibility of direct review in this Court is a sufficient safeguard of the policies which Congress was intending to further when it enacted the Federal Civil Rights Act. *See* discussion in *England, supra,* 375 U.S. at 416-417.

e.g., *Yuclan Enterprises, Inc. v. Nakagawa,* 583 F.Supp. 1574 (D.Hawaii 1984) [where, under the authority of F.R.Civ.P. 60(b), the federal court rescinded its prior final judgment which had enjoined enforcement of a Hawaii obscenity statute, following the subsequent ruling of the Hawaii Supreme Court rendering a saving construction of the statute].

Similarly, in *Sovereign News Co. v. Corrigan,* 610 F.2d 428 (6th Cir. 1979), *cert. den.* 447 U.S. 923 (1980), a District Court's order preliminarily enjoining enforcement of an Ohio anti-obscenity statute was remanded by the Sixth Circuit Court of Appeals for further consideration after a state court, in a ruling subsequent to the District Court's injunctive order, had rendered a potentially saving construction of the statute.

The State of Washington has not only had, at all times, the option of bringing a state court civil declaratory judgment action seeking a saving judicial construction of the statute, but has also had the option of simply amending the legislation here at issue so as to remove its constitutional difficulties.

That the State has exercised *neither* of the two available options simply underscores the hollowness of its claims that any such limiting construction could reasonably be expected. In brief, there are simply no special circumstances presented in the case at bar mandating the creation of a new "first look" doctrine or mandating a new circumstance where *Pullman* abstention should be required.

———o———

SUMMARY

The near-unanimous adoption of the *Miller* test by courts and legislatures throughout the country has brought welcome stability to a previously unstable area of constitutional and statutory law.

The opinion of the Court of Appeals for the Ninth Circuit is consistent with the relevant decisions of this Court and federal courts throughout the country, as well as virtually all state courts and legislatures which have addressed the subject. Appellants have erroneously characterized the issues and their importance. Appellees respectfully submit that neither appellants' jurisdictional statements nor the opinion of the Court of Appeals for the Ninth Circuit raise substantial federal questions.

Affirmance of the opinion below will leave all state anti-obscenity legislation undisturbed except for Washington's and Mississippi's. (*See, Goldstein v. Allain, supra*).

CONCLUSION

For all the reasons above, the judgment of the Ninth Circuit Court of Appeals should be affirmed.

August 7, 1984

Respectfully submitted,

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Nos. 84-28 and 84-143

In The

Supreme Court of the United States

October Term, 1984

No. 84-28

DONALD C. BROCKETT,
Spokane County Prosecuting Attorney
Appellant,

vs.

SPOKANE ARCADES, INC., et al.,
Appellees,

No. 84-143

KENNETH EIKENBERRY,
Attorney General for the State of Washington, et al.,
Appellants,

vs.

J-R DISTRIBUTORS, INC., et al.,
Appellees,

On Appeal From The United States
Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE, CITIZENS FOR DECENCY THROUGH LAW, INC., AND CHARLES H KEATING, JR., IN SUPPORT OF APPELLANTS AND MOTION FOR LEAVE TO FILE

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MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE BY CITIZENS FOR DECENCY THROUGH LAW, INC. AND CHARLES H KEATING, JR. IN SUPPORT OF APPELLANTS

Charles H Keating, Jr., and Citizens for Decency through Law, Inc., the Moving Parties herein, respectfully move this

Honorable United States Supreme Court, pursuant to Court Rule 36, for leave to file a brief as Amici Curiae in support of Appellants. Consent was granted by Appellants and was not granted by Appellees.

Moving Parties have a special and fervent interest in the subject matter of this appeal, having devoted considerable time, study, and effort to assisting federal and state law enforcement authorities over the past twenty-five years in the enforcement of laws regulating and combatting the commercial exploitation of obscene materials within this country. Charles Keating is the founder and co-counsel for Citizens for Decency through Law, Inc., formerly Citizens for Decent Literature, Inc., an Ohio corporation with over one hundred thousand contributors and supporters and with chapter affiliates throughout the

United States. Citizens for Decency through Law, Inc. (CDL), is a non-profit, non-sectarian, and non-political organization with its national headquarters formerly located in Cleveland, Ohio, now located at 2331 W. Royal Palm Road, Phoenix, Arizona, formed for and dedicated to the support of effective and rational obscenity laws and the efforts of governing legislative bodies in the passage of obscenity legislation through public education, the dissemination of existing and proposed obscenity laws, and lending legal assistance to prosecutors and law enforcement personnel.

Moving Party was also a member of the Presidential Commission on Obscenity and Pornography. Responding to the opening statement of Public Law 90-100, "The Congress finds that the traffic in

obscenity and pornography is a matter of national concern.", Moving Party authored and released his findings in the "Report of Charles H Keating, Jr., Commissioner", which explained the workings of the Commission and the wealth of statistical information and human experiences which prove the relationship between the purveyance of obscenity to crimes and other anti-social behavior. (Report released September 30, 1970.)

That Moving Party's personal efforts, and those of CDL, are shared on a national level is evidenced by CDL's Honorary Committee membership of hundreds of past and present members of Congress and state governors, as well as respected and dedicated clergy, educators, prosecutors, media personnel, and corporate officers who join in the function and goals of CDL and Mr. Keating.

The extent of Moving Party's involvement in the actual enforcement of obscenity laws is evidenced by his having been plaintiff on behalf of the state of Ohio in an obscenity nuisance abatement action which was affirmed by the Supreme Court of Ohio, State of Ohio, ex rel. Charles H Keating, Jr. v. A Motion Picture Film Entitled "Vixen", et al., 27 Ohio St.2d 278, 272 N.E.2d 137 (1971), affirmed on remand from this Court, 35 Ohio St.2d 215, 301 N.E.2d 880 (Sept. 26, 1973).

Moving Party and CDL have filed numerous briefs amicus curiae in this Court urging that obscenity laws or convictions be upheld including: Jacobellis v. Ohio, 378 U.S. 184, 12 L.Ed.2d 793, 1333 (1964); Memoirs v. Massachusetts, 383 U.S. 413, 16 L.Ed.2d 11 (1966); Ginzburg v. United States, 383 U.S. 463, 16 L.Ed.2d 31 (1966); Mishkin

v. New York, 383 U.S. 502, 16 L.Ed.2d 56 (1966); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 37 L.Ed.2d 447 (1973); Heller v. New York, 413 U.S. 483, 37 L.Ed.2d 745 (1973); Jenkins v. Georgia, 418 U.S. 153, 41 L.Ed.2d 642 (1974); Marks v. United States, 430 U.S. 188, 51 L.Ed.2d 260 (1977); Splawn v. California, 431 U.S. 595, 52 L.Ed.2d 606, 883 (1977); Vance v. Universal Amusement Co., 445 U.S. 308, 63 L.Ed.2d 413 (1980); and New York v. Ferber, ___U.S.___, 73 L.Ed.2d 1113 (1982).

CDL staff attorneys have prosecuted literally hundreds of successful obscenity cases in states across this country, and they advise government attorneys and law enforcement personnel on a daily basis on matters relating to the preparation, trial, and appeal of obscenity and child pornography cases. Because of this practical experience in

dealing nationally with the application and interpretation of obscenity legislation, Amici are well-qualified to present facts relating to the "in-court" application of Washington's obscenity law which will probably not be presented to this Court by the parties themselves.

Moving parties hope to demonstrate that the definition of "prurient" in the Washington law is constitutional in all respects, and that lower court rulings and interpretations have twisted the meaning of the term to such an extent that law enforcement efforts nationally are severely threatened. Amici further hope to urge that this Court's approval of the Washington definition of "prurient" will result in more logical and consistent enforcement of obscenity and child pornography laws in harmony with the prior decisions of this Court. Moving parties submit that the practical

application of this definition of "prurient" is important to the Court and will be relevant to the disposition of this case.

It is sincerely hoped that this Court will grant our Motion for Leave to File a Brief as Amici Curiae and allow us to participate in this important case which presents important issues for all the people of the United States as well as those of the State of Washington.

Respectfully submitted,

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BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANTS

PROPOSITION OF LAW

THE DEFINITION OF "PRURIENT" IN THE OBSCENITY STATUTE OF THE STATE OF WASHINGTON IS A PROPER AND CONSTITUTIONAL DEFINITION WHICH IS SUPPORTED BY ALL PRIOR DECISIONS OF THIS COURT.

SUMMARY OF ARGUMENT

The restrictive definition of "prurient" urged by Appellees has resulted nationally in misinterpretations and misapplications of obscenity legislation. Through this misapplication of the law and by the misuse of expert testimony, defense counsel and lower courts have applied the "prurient interest" test so that material becomes less obscene as it becomes more sexually explicit, deviant, bizarre, and degrading. Such an interpretation is inconsistent with the prior decisions and intent of this Court.

The definition of "prurient" in the obscenity statute of the State of Washington is proper and is supported by all prior decisions of this Court. By reaffirming the Washington definition, this Court will end the misapplication of the "prurient interest" test, and will

ensure more consistent and vigorous enforcement of federal and state obscenity laws.

LAW AND ARGUMENT

A. THE ISSUE RELATING TO A PROPER AND CONSTITUTIONAL DEFINITION OF "PRURIENT" IS SO SUBSTANTIAL THAT IF THE JUDGMENT OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT IS ALLOWED TO STAND, THE ENFORCEMENT OF EVERY OBSCENITY LAW IN THE COUNTRY WILL BE ADVERSELY AFFECTED.

The primary purpose for the submission of this brief is to rebut the argument made by Appellees to this Court in their Motion to Dismiss or Affirm that the definition of "prurient" in the Washington state obscenity code involves an insubstantial issue. Appellees argue that because this is an insubstantial issue, the appeal should be dismissed. Contrary to the argument of Appellees, this is an issue of such importance that the enforcement of every obscenity law in

the country will be adversely affected if the ruling the Court of Appeals is allowed to stand.

Amici is fearful that the debate in this Court will take place without a serious presentation of the way in which this definition of "prurient" affects obscenity trial prosecution and defense strategy. Amici will demonstrate the manner in which the "prurient interest" test has become central to defense strategy in obscenity trials, and why permitting a definition of prurient other than "shameful or morbid" would eliminate an often-successful strategy used in trials across the country by defense attorneys in obscenity cases.

1. The "prurient interest" test has been misinterpreted and convoluted by attorneys and lower courts to such an extent that in its application, material can become less "prurient", and therefore less obscene, as it becomes more sexually explicit and deviant.

The "prurient interest" test is central to obscenity law and is usually the most vigorously contested point between government attorneys and those engaged in the business of pornography wherever in the country an obscenity trial takes place. This Court, Amici submits, made clear in Roth v. United States, 354 U.S. 476, 487 n.20 (1957); Mishkin v. New York, 383 U.S. 502, 508 (1966); and Miller v. California, 413 U.S. 15, 30 (1973), that prurience is a legal term of art meaning a "lustful", "erotic", "lewd", "lascivious", or "shameful or morbid" type of sexual interest which must be found to be the predominant or "as a whole" appeal or direction of an obscene book or film. In all respects, Amici supports and reaffirms the argument of Appellants that defining "prurient" as "that which incites lasciviousness or lust" is a

constitutionally acceptable definition of "prurient" which is supported by numerous decisions of this Court. Appellants have and will adequately discuss the legal authority for the Washington definition of the term "prurient." Amici will, therefore, discuss in detail the significance of these definitions and the reasons why attorneys for this industry are fighting the Washington definition with such fervor.[1]

It would seem logical in reading the decisions of this Court that in applying the tests of obscenity, a film, magazine, or other item would become more obscene and illegal as it becomes more sexually explicit and/or deviant. In the Mishkin

---

[1] See, Goldstein v. Allain, 568 F.Supp. 1377 (N.D. Miss. 1983), where the attorney of record for Appellees was successful at the District Court level in enjoining the enforcement of the Mississippi obscenity statute which defines "prurient interest" as "a lustful, erotic, shameful, or morbid interest in nudity, sex or excretion."

case, 383 U.S. at 508, it was argued that books involved in that case which depicted various deviant sexual practices such as flagellation, fetishism, and lesbianism did not satisfy the prurient appeal test because they did not appeal to a prurient interest of the "average person" in sex, and that instead of "stimulating the erotic, they disgust and sicken." This Court quickly rejected this absurd argument "as being founded on an unrealistic interpretation of the prurient-appeal requirement." However, the ruling in the Mishkin case has not deterred creative defense attorneys in obscenity cases from making this same or similar argument in cases since 1966 and up to the present time.

In an article by a leading obscenity defense lawyer, it is explained how this interpretation of the "prurient interest" test, which was rejected by this Court in

Mishkin, can be used successfully to defend even the most abhorrent material. In an article by Harold Price Fahringer, he states:

> The material charged with being obscene is to be judged by its impact on the normal person, not by its effects on persons who are easily influenced or sensitive.
>
> . . .
>
> Thus, if you have a work that obviously appeals to a bizarre sexual appetite, an argument can be made by the defense that it would not appeal to the average person's (or juror's) sexual desires. Consequently, an acquittal is mandated under this part of the obscenity test if the average person is unaffected by the material charged.

Fahringer, "The Defense of an Obscenity Prosecution", Trial Magazine (May, 1978).[2]

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[2] Harold Price Fahringer was the attorney for the respondent in the case of New York v. Ferber, ___U.S.___, 73 L.Ed.2d 1113 (1982), where this Court rejected the contention of Mr. Fahringer's client that child pornography could not be proscribed unless the material met the legal definition of obscenity.

Mr. Fahringer's use of this strategy in a trial situation was discussed in another article.[3] In this writer's account of a New York City trial in which Mr. Fahringer served as defense counsel, the films involved in the prosecution depicted "explicit sex acts between two male homosexuals with one of the performers committing an act of oral sodomy on a dog." Id. at 227. Mr. Cohen made the following observations in his article about Fahringer's closing argument:

> He acknowledged that the films charged against his client were the most distasteful he had ever seen. He confided to the jury that he too had difficulty looking at them during their exhibition in the courtroom. However, the defense attorney stressed that the definition of obscenity had to be carefully adhered to like

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[3] Cohen, "Obscenity Cases: Anatomy of a Winning Defense", Criminal Law Bulletin, Vol. 14, No. 3, pp. 225-31 (May-June 1978).

> any other rule of law involved in a criminal trial.
>
> Fahringer reminded the jurors that before they could find the films obscene, they had to be convinced, beyond a reasonable doubt, that they appealed to the "average person's prurient interest in sex." . . . He stressed the point to the jurors that they were "average" people. "Prurient appeal" meant a "morbid or shameful interest in sex," and the word "interest," as defined by Webster's dictionary, meant "inducing one to engage in or participate in." He then insisted that if the films aroused them to the extent that they would be induced to participate in acts of beastiality--then they should find them obscene! If, on the other hand, they found the films so repulsive and disgusting that they were repelled by them, they should return a verdict of not guilty. With that, he concluded argument and sat down.

Id. at 229 (emphasis added). Cohen explains that the source of Mr. Fahringer's argument was the case of United States v. Roth, supra. The author of this article goes on to inform the

reader that Fahringer obtained an acquittal in this case by "turning obscenity on its head." Id. at 231. He concluded his article with the observation that obviously the more perverse or bizarre the sex depicted, the less likely it is that the definition of obscenity will be found to apply. The Court will note that this trial tactic was successful in this New York City obscenity trial 11 years after this Court ruled in Mishkin that such an argument was "founded on an unrealistic interpretation of the prurient appeal requirement." 383 U.S. at 508.

Since 1978, defense attorneys in obscenity trials continued to develop their skills in convoluting the "prurient appeal" requirement of obscenity. In a newspaper article, a writer from Fairfax, Virginia describes how another leading obscenity defense attorney used the

"prurient appeal" test to obtain acquittals in obscenity prosecutions.[4] The author of this news article described the events as follows:

> Fairfax county is losing the battle against pornography.
>
> Skillfully designed and lavishly financed defense tactics are chipping away at the county's once solid attack against sellers of adult books, like Croatan Books Inc.
>
> Until recently, county prosecutors had tallied up more than 100 indictments against the corporation for the sale of obscene magazines. From 1974 until April, 1982, the county won 84 cases bringing in $664,000 in fines from Croatan.
>
> . . .
>
> But the tide turned this past month when Croatan won eight straight cases with the aid of Baltimore attorney Burton W. Sandler, who has a national reputation for expertise in handling First Amendment obscenity cases.
>
> Calling the court's decision a "giant step for freedom of expression in Fairfax County," Sandler said his victory demonstrates that the average county

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[4] George, "Porn Peddlers Take Edge in Legal Dual", Fairfax Journal, June 16, 1982.

resident does not have a "prurient" (morbid, degrading and shameful) interest in sex when they read Croatan's adult magazines.

. . . .

Hurd said his defeat was due primarily to Croatan's "high-powered" and expensive defense, which brought in such witnesses as sexologists from California and a psychologist from Johns Hopkins University.

And it was a new defense tactic presented by Sandler that caught prosecutors, witnesses, and jurors off guard, Hurd said. . . .

But Sandler tried a new defense by cross-examining Hurd's witnesses, including the police officer who bought the magazine and a women civic leader, and asking three questions:

Are you an average person in Fairfax County? Do you have a healthy interest in sex? Do you have a shameful, morbid, or sick interest in sex?

All witnesses answered yes to the first two questions and no to the last question, Sandler said.

He then asked witnesses to read the magazines in court. After they finished he asked, "Do you have a prurient interest--an itching or longing to jump someone--after reading this material?" No one answered yes, Sandler said.

> "If that prurient interest element was not met therefore the material is not obscene. That has not been done in Fairfax County before," Sandler said.

Id. (emphasis added). The Court will notice several elements to this defense presented in these Virginia cases. First of all, the defense attorney was permitted to offer evidence through cross-examination and through defense "expert" testimony that an average person does not have a shameful or morbid interest in sex--he has only a healthy interest in sex. Therefore, he can argue that the "prurient interest" test is not met and an acquittal is mandated. He goes on to ask whether or not the material aroused interest in the witnesses to such an extent that the witnesses would have "an itching or longing to jump someone--after reading this material." This attorney thus refined the argument and tactic of

attorney Fahringer from 1978, by not only arguing that the material does not arouse interest and is therefore not obscene, but also he has successfully argued by means of paid "expert" testimony that an average person does not have a shameful, morbid, or sick interest which can be appealed to. This defense strategy has, in effect, destroyed this Court's definition of obscenity which assumed that a mythical average person would have a "prurient" interest which could be appealed to. Attorneys Sandler and Fahringer have both convoluted the Court's "prurient interest" requirement by changing it to require actual "arousal" and not an "appeal" to a "prurient" interest in sex as this Court defined the test.

In a 1981 case involving a motion picture entitled "Caligula", it can again be demonstrated how the "prurient

interest" requirement can be thoroughly twisted to avoid a determination of obscenity when the definition of "prurient" is limited to "shameful" or "morbid." Penthouse International, Ltd. v. McAuliffe, Civil Action No. C80-2172A (N.D. Ga. May 15, 1981).[5] In this case, the trial court ruled that to appeal to the "prurient interest" the material must "sexually stimulate the viewer or reader." Id., slip op. at 6 (emphasis added). The trial judge in the case was greatly impressed by the expert testimony provided by the makers of the film "Caligula." In his order, he

---

[5] On appeal, a panel of the Eleventh Circuit Court of Appeals reversed in part and affirmed in part, 702 F.2d 925 (11th Cir. 1983). The Court of Appeals reheard the case en banc thus vacating the panel opinion and then proceeded to affirm the District Court opinion "by operation of law" when the en banc court split by a vote of six to six on a disposition of the case. 717 F.2d 517 (11th Cir. 1983), cert. denied, ___U.S.___, 104 S.Ct. 1615 (1984).

emphasized the testimony of Dr. Downing Tait, Jr., who testified that:

> . . . to the average person in Fulton County, the overwhelming depictions of violence, cruelty, and sexual explicitness in Caligula would not arouse erotic interest.

Id., slip op. at 7.

Another witness testified that the average person would likely find the film revolting and offensive but lacking in stimulative effect. All of this "expert" testimony convinced the judge to determine the following regarding the "prurient appeal" requirement as it related to the "hard-core" film at issue:

> The concept of prurient appeal has never been adequately defined by the Supreme Court. It is clear from the cases, however, that the presence of shocking, disgusting, or explicitly sexual scenes in a movie is insufficient to satisfy the "prurient interest" test of Miller. . . . While Caligula, taken as a whole, certainly does not appeal to a healthy or normal interest in sex, neither does

> it appeal to a prurient interest in sex. The tendency of Caligula instead is to inhibit sexual stimulation. The court finds, as did the advisory jury, that to the average person applying contemporary community standards, the film Caligula, viewed in its entirety, does not appeal to the prurient interest in sex.

Id., slip op. at 9 (emphasis added). Thus it can be seen that the producers of the film "Caligula" were successful in providing "expert" testimony that an average person would not be aroused by the depictions of sexual activity in the film "Caligula" and, therefore, the court determined that the film was so shocking, disgusting, and sexually explicit that it would not satisfy the "prurient interest" test of Miller and would, therefore, not be obscene. Soon after this Court denied certiorari in the McAuliffe case, one of the nation's newspapers commented on this decision:

> The Supreme Court yesterday agreed with the movie review offered by a lower court and decided that the film "Caligula" is so repulsive that it can't be considered obscene. The high court left intact the ruling of the lower court which said that the Bob Guccione film is not legally obscene because it does not arouse people, but repels and offends them.

Norman, "Top Court: Film too Vile to be Obscene," New York Post, March 20, 1984.

The above examples give this Court an indication as to the manner in which the "prurient interest" test has been convoluted, misinterpreted, and distorted by pornography defense attorneys and lower courts. By confining the definition of "prurient" to "shameful or morbid", defense attorneys in obscenity cases have several options available by which they can obtain acquittals. To summarize, if the material at issue in the trial is on the mild end of the spectrum in its sexual explicitness (such

as a Penthouse or Hustler magazine [6]), expert testimony can be used to demonstrate that average people do not have a "shameful or morbid" interest in sex and have only a "healthy" interest. The "expert" would then offer an opinion that these magazines appeal to a healthy and not shameful or morbid interest, and therefore an acquittal is justified. As the magazines or films become more sexually explicit and/or deviant, expert

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[6] In a case originating in Atlanta, an issue of Penthouse magazine was determined obscene in 1980 by the Court of Appeals for the Fifth Circuit. Penthouse International, Ltd., et al. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980). A jury in Atlanta found Hustler magazine to be in violation of that state's obscenity law in 1979. Flynt v. State of Georgia, 264 S.E.2d 669 (Ga. Ct. App. 1980), cert. denied, 449 U.S. 888 (1980). The Court will note that such decisions were probably aided by state appellate court decisions permitting further jury instructions in obscenity trials defining "prurient" as "material having a tendency to excite lustful thoughts." This jury instruction was taken from Roth v. United States, 354 U.S. at 487 n.20. See, Spry v. State of Georgia, 274 S.E.2d 2, 5 (Ga. Ct. App. 1980).

testimony will be used to establish that average people do not have a "shameful or morbid" interest in sex, but only a "normal or healthy" interest, and therefore would not be aroused by the material but would be offended or repulsed. As should be obvious from this analysis, it becomes easier for a defense attorney to get an acquittal in an obscenity trial as the material becomes more disgusting and degrading (such as the previously discussed beastiality movie), as long as the definition of "prurient" is restricted to a "shameful or morbid" interest in sex.

As will be shown in the next section, a definition of "prurient" as that which incites "laciviousness or lust" would remedy this ridiculous situation that has developed in the lower courts, and would further this Court's original intention that as material

becomes more explicit, it would become more obscene under the law.

2. The abuse, misinterpretation, and convolution of the "prurient interest" test can be remedied by upholding the Washington definition of "prurient" as "that which incites lasciviousness or lust."

It is an obvious distortion of this Court's intent to interpret the body of obscenity law to result in acquittals as material becomes more explicit, deviant, and bizarre. This situation resulted because of lower court interpretations that in order to be obscene, material must appeal to a shameful or morbid interest in sex and by interpretations that average people do not have such shameful or morbid interests in sex. By permitting definitions of "prurient" other than shameful or morbid, as this Court has done in its previous

decisions, this abuse of the law can be stopped. By permitting definitions of prurient in terms such as "lustful", "lewd", "lascivious", and "erotic", defense attorneys and courts will not be able to argue that the more vile the material becomes, the less obscene it becomes.

It should also be mentioned that the definition of "prurient" urged by Appellees creates an obvious contradiction between the "prurient appeal" and "patent offensiveness" prongs of the Miller test of obscenity. Under the "patent offensiveness" test, the material must, applying contemporary community standards, be patently offensive to the average person. The kinds of conduct that can be determined "patently offensive" are the "hard core" types of conduct suggested as examples by this Court in Miller (these could clearly

be "lustful", "erotic", or "lascivious" depictions of sexual conduct).[7] However, under the interpretation of Appellees and many lower federal and state courts, the material must, at the same time, appeal to or stimulate the average person under the "prurient appeal" test. This interpretation of the law is absurd, but will continue unless this Court upholds the definitions of "prurient" as written by the Washington legislature following this Court's own language. Referring back to the example given earlier where Mr. Fahringer obtained an acquittal in a trial where the "hard-core" film at issue involved "an act of oral sodomy on a dog", such a verdict would probably not have been possible if "prurient" had also been defined for the jury as a

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[7] See, Smith v. United States, 431 U.S. 291, 301 (1977).

"lascivious" or "lewd" interest in sex, and if the judge had given a "deviant" instruction pursuant to Mishkin v. New York, supra; Hamling v. United States, 418 U.S. 87 (1974); and Pinkus v. United States, 436 U.S. 293 (1978).

This Court can also remedy the abuse of this test by reaffirming its position that the test is met by determining the intended or apparent appeal of the material and not whether it actually arouses an average person, or arouses witnesses, members of the jury, or the judge of the court itself. The situation can further be remedied by stopping the abuse of expert witness testimony. It is ludicrous to allow expert witnesses to testify contrary to the law and to this Court's intent in establishing the law as they do in these cases when they testify that an average person does not have a "shameful or morbid" ("prurient")

interest in sex. Obviously, when this Court established this requirement it assumed that average people did have a broader "prurient" interest that could be appealed to (not necessarily aroused). In conclusion, by affirming the Washington definition of "prurient interest", this Court can remedy a misinterpretation of the law which has frustrated obscenity prosecutions in this country for at least the past 15 years, and can bring the prosecution of obscenity cases into uniformity with this Court's prior opinions and interpretations.

B. THE COURT OF APPEALS FOR THE NINTH CIRCUIT ACTED IN TOTAL DISREGARD OF POLICIES OF FEDERALISM AND COMITY IN INVALIDATING THE WASHINGTON OBSCENITY LAW, WHERE STATE COURTS HAD BEEN GIVEN NO OPPORTUNITY TO CONSTRUE THE STATUTE AND WHERE FEDERAL CONSTITUTIONAL CLAIMS COULD HAVE BEEN RAISED AND CONSIDERED IN STATE COURTS AS THE LAW WAS APPLIED.

Amici fully support Appellants in their position that the courts below should have abstained from making a facial analysis of the Washington obscenity statute, and should have permitted state courts to interpret the law in a manner consistent with prior decisions of this Court.

CONCLUSION

For these reasons, the issues presented in these cases are substantial, and the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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Nos. 84-28 and 84-143

In the Supreme Court of the United States

OCTOBER TERM, 1984

DONALD C. BROCKETT, APPELLANT

v.

SPOKANE ARCADES, INC., ET AL.

KENNETH EIKENBERRY, ATTORNEY GENERAL OF WASHINGTON, ET AL., APPELLANTS

v.

J-R DISTRIBUTORS, INC., ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-28

DONALD C. BROCKETT, APPELLANT

v.

SPOKANE ARCADES, INC., ET AL.

No. 84-143

KENNETH EIKENBERRY, ATTORNEY GENERAL OF WASHINGTON, ET AL., APPELLANTS

v.

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ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

INTEREST OF THE UNITED STATES

This case raises important questions concerning the constitutional limitations on legislation regulating obscenity. The United States has a direct interest in this issue because the federal criminal statutes governing dissemination of obscene materials in in-

terstate commerce and the mails, 18 U.S.C. 1461, 1462 and 1465, are subject to these constitutional limitations. Moreover, the total effort to control obscenity, of which the enforcement of federal statutes is an integral part, is rendered less effective by contrived interpretations of state statutes which fall within guidelines set by this Court.

In *Roth* v. *United States*, 354 U.S. 476 (1957), and *Miller* v. *California*, 413 U.S. 15 (1973), this Court formulated a test setting out the constitutionally permissible scope of both federal and state criminal statutes governing obscenity. One part of the test adopted by this Court requires that, in order to be found obscene, the materials in question must appeal to the "prurient interest" in sex. The court of appeals in this case held that the term "prurient" in the *Roth-Miller* test may not be defined with reference to the word "lust," and that a statute that uses the word "lust" in defining "prurient interest" is facially invalid. If adopted, the lower court's restrictive definition of "prurient interest" would impair the ability of state and federal courts to explain the meaning of the term "prurient" to juries, and it would confine the ability of both Congress and the state legislatures to define the concept of "prurient interest."

The court of appeals invoked the "overbreadth" doctrine to invalidate the Washington state statute before the state courts had an opportunity to apply and construe that law. An expansive application of the "overbreadth" doctrine, such as that employed by the court of appeals in this case, could subject federal as well as state obscenity statutes to facial constitutional challenges whenever a statute departs in any way from the precise language of the constitutional test set forth by this Court. That ap-

proach could interfere with the enactment as well as the enforcement of both federal and state obscenity legislation.

STATEMENT

1. In 1982, the State of Washington enacted an anti-obscenity statute, referred to as House Bill 626 (84-28 J.S. App. 1a-5a). The statute imposes criminal penalties for the sale, exhibition, display, or production of "lewd matter" for profit-making purposes (84-28 J.S. App. 1a, 4a; Wash. Rev. Code Ann. § 9.68.040 (Supp. 1984-1985)).[1] The statute defines "lewd matter" by adopting the constitutional standard governing the regulation of obscene materials set forth by this Court in *Miller* v. *California*, 413 U.S. 15 (1973). The statute provides (84-28 J.S. App. 1a; Wash. Rev. Code Ann. § 7.48A.010(2) (Supp. 1984-1985)):

> (2) "Lewd matter" is synonymous with "obscene matter" and means any matter:
>
> (a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and
>
> (b) Which explicitly depicts or describes patently offensive representations or descriptions of:

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[1] The statute also establishes a system of civil penalties for "moral nuisances," which include places where lewd films are exhibited or possessed for the purpose of exhibition, lewd films, places where lewd publications "constitute a principal part of the stock in trade," and places used "as a regular course of business" for lewdness or prostitution (84-28 J.S. App. 3a; Wash. Rev. Code Ann. § 7.48A.020 (Supp. 1984-1985)). This portion of the statute also was held unconstitutional by the court of appeals, but that aspect of the ruling below is not at issue in this Court.

(i) Ultimate sexual acts, normal or perverted, actual or simulated; or

(ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or

(iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

(c) Which, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value.

The statute then defines the term "prurient," which is used in the definition of "lewd matter," as follows (84-28 J.S. App. 2a; Wash. Rev. Code Ann. § 7.48A.010(8) (Supp. 1984-1985)):

"Prurient" means that which incites lasciviousness or lust.

2. On April 5, 1982, four days after the effective date of the statute, appellees commenced two actions in the United States District Court for the Eastern District of Washington challenging the facial constitutionality of House Bill 626 (84-28 J.S. App. 51a). On April 13, the district court issued a preliminary injunction barring the State from enforcing the statute. The district court subsequently rejected appellees' challenge on the merits and held that the statute is not unconstitutional on its face (84-28 J.S. App. 6a-45a). Appellees then obtained a stay of the district court judgment, and the United States Court of Appeals for the Ninth Circuit granted their motion to enjoin enforcement of the statute during the pendency of the appeal (84-28 J.S. App. 52a-53a).

3. The court of appeals reversed the district court's judgment by a divided vote (84-28 J.S. App. 47a-98a), holding that House Bill 626 is unconstitutional on its face. The flaw in the statute, according to the court of appeals, is that it includes the word "lust" in its definition of the term "prurient." Judge Wallace dissented from the majority's ruling (see 84-28 J.S. App. 86a-98a).

The court of appeals first stated that it was appropriate to hold House Bill 626 unconstitutional on its face if the statute reached beyond obscene materials and could be applied to any constitutionally-protected speech (84-28 J.S. App. 54a-58a). Where such First Amendment interests are involved, the court held, a statute need not be "substantially overbroad" in order to be challenged successfully as facially unconstitutional (84-28 J.S. App. 57a-58a).

The court also rejected the State's request that the court abstain from reaching the merits of the constitutional dispute until after the Washington state courts had an opportunity to construe House Bill 626 because their construction of the statute might avoid the constitutional issue (84-28 J.S. App. 58a-61a). The court found abstention to be inappropriate because appellees' challenge was based on the First Amendment, and because the court concluded that "several key provisions of House Bill 626 are not susceptible to such saving constructions" (84-28 J.S. App. 61a).

With respect to the merits of the constitutional issue, the court held that because the statutory definition of "prurient" included the term "lust," the statute was inconsistent with the test set forth by this Court in *Miller* v. *California*, *supra*. The court

stated that the term "lust" connotes nothing more than "sexual desire," while the term "prurient" is more restrictive and means only "a shameful or morbid interest in nudity, sex or excretion" (84-28 J.S. App. 69a). The court then concluded that because the statute defines "prurient" by the express use of the term "lust," a limiting construction of the statute would be impossible. The court wrote that "a state court would either have to ignore the statutory definition completely or rewrite the statute in order to narrow its unconstitutional scope" (84-28 J.S. App. 72a).

In dissent, Judge Wallace took sharp issue with the majority's constitutional analysis. He pointed out that in this Court's decision in *Roth* v. *United States*, 354 U.S. 476 (1957), the Court had expressly employed the word "lustful" in defining the term "prurient interest," and that nothing in this Court's subsequent opinions suggested that the word "lust" could no longer permissibly be used in defining "prurience" (84-28 J.S. App. 86a-98a). In addition, Judge Wallace found that, at worst, a limiting construction of the statute "is so obvious that, for prudential reasons, we should at least refuse to decide [appellees'] constitutional challenges on the basis of Washington's mere use of the word 'lust' until a case arises applying the statute" (84-28 J.S. App. 97a).

The appellants noted their appeals to this Court (84-28 J.S. App. 104a-109a; 84-143 J.S. App. E1-E6). On October 1, 1984, this Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

The Washington statute's definition of the term "prurient" as "that which incites lasciviousness or lust" plainly is authorized by the decisions of this Court. In *Roth* v. *United States*, 354 U.S. 476, 487 n.20 (1957), this Court used the word "lustful" in defining the term "prurient interest," and in the years since *Roth* the Court has never suggested that "lust" may not be used in defining the concept of prurience. Moreover, modern dictionary definitions of the term "prurient" are entirely consistent with the definition found in the statute. Thus, contrary to the view of the court of appeals, the Washington statute was not rendered facially invalid by the inclusion of the word "lust" in the definition of the term "prurient."

Even if it was in some way improper for the Washington legislature to have used the word "lust" in the statutory definition of "prurient," the use of that word did not render the statute impermissibly overbroad. This Court has held that statutes may not be declared facially invalid on overbreadth grounds unless they are "substantially overbroad." If the Washington statute could in some hypothetical case extend to materials that are not obscene under this Court's decision in *Miller*, the class of materials that would be reached is so small that the statute cannot fairly be deemed "substantially overbroad." The application of overbreadth analysis to a statute such as House Bill 626 is particularly inappropriate in light of the fact that the statute clearly is intended simply to incorporate the constitutional standards set forth in *Miller*. It seems highly unlikely that any person subject to possible prosecution under the statute will be dissuaded from engaging in

protected speech for fear that the statute extends beyond the limits of *Miller*.

Finally, the court of appeals erred in asserting that the definition of "prurient" in the Washington statute was "not susceptible to * * * [a] saving construction[]" (84-28 J.S. App. 61a). While the term "lust," like most of its common synonyms, has varying connotations, the term is most often used to describe something other than a healthy interest in sex. It seems likely that the Washington courts, if given the chance, would construe the term "lust" to refer to an unwholesome interest in sex. If construed in that fashion, the state statute clearly would overcome any constitutional objection. The court of appeals therefore should have stayed its hand to permit the state courts to construe that term in a manner that might well have satisfied even the most exacting constitutional scrutiny.

ARGUMENT

THE DEFINITION OF "PRURIENT INTEREST" IN THE WASHINGTON STATUTE IS NOT UNCONSTITUTIONALLY OVERBROAD

I. The Term "Prurient" Permissibly May Be Defined As "That Which Incites Lasciviousness Or Lust"

In *Miller* v. *California*, *supra*, this Court set forth the constitutional standard for the regulation of obscene materials. In order to be subject to regulation under a valid obscenity statute, the Court held, a work that depicts or describes sexual conduct must (1) "appeal to the prurient interest in sex"; (2) "portray sexual conduct in a patently offensive way"; and (3) lack "serious literary, artistic, political, or scientific value." 413 U.S. at 24.

The Court in *Miller* did not define the term "prurient interest." Instead, the Court gave content to that term by referring to its earlier opinion in *Roth* v. *United States, supra.* In a footnote in *Roth*, the Court discussed at some length the meaning of the term "prurient." The Court first defined material appealing to "prurient interest" as material "having a tendency to excite lustful thoughts." 354 U.S. at 487 n.20. The Court then observed that dictionary definitions of the term "prurient" use words such as "desire or longing," "itching, morbid, or lascivious longings," and "lewd," and that in a prior decision the Court had suggested that "prurient" means the opposite of "wholesome." *Ibid.*, citing *Mutual Film Corp.* v. *Industrial Commission*, 236 U.S. 230, 242 (1915). Finally, the Court noted that the Model Penal Code defined the term "prurient interest" as meaning "a shameful or morbid interest in nudity, sex, or excretion," and stated that it perceived "no significant difference" between the Model Penal Code definition of "prurient interest" and the definitions that had been developed in the caselaw.[2] Thus, the

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[2] In a reference to the prior caselaw on the subject (see 354 U.S. at 489 n.26), the Court cited a number of cases that described the test for obscenity by using the terms "lust" or "lustful." See *Parmelee* v. *United States*, 113 F.2d 729, 736 (D.C. Cir. 1940) (material is protected if "the erotic matter is not introduced to promote lust"); *United States* v. *One Book Called "Ulysses"*, 5 F. Supp. 182, 184 (S.D.N.Y. 1933) (meaning of the word 'obscene" is "[t]ending to stir the sex impulses or to lead to sexually impure and lustful thoughts"); *Commonwealth* v. *Isenstadt*, 318 Mass. 543, 550, 62 N.E.2d 840, 844 (1945) (material is obscene if it has "a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire"); *Missouri* v. *Becker*, 364 Mo. 1079, 1085, 272 S.W.2d 283, 286

Roth Court clearly approved "lustful" as one of several possible definitions for the term "prurient interest" in the context of an obscenity prosecution.

The Court confirmed the propriety of using the word "lustful" in defining obscenity by upholding the jury instructions given in the two cases under review in *Roth*. In the first case, the trial court had defined obscene materials by reference to their tendency "to excite lustful thoughts." 354 U.S. at 486. The trial court in the other case had defined obscene materials as those that have a tendency to corrupt "by inciting lascivious thoughts or arousing lustful desires." *Ibid.* This Court found no flaw in either formulation, even though each prominently featured the term "lustful."

Most federal courts have adopted the Model Penal Code definition of "prurient" as "a shameful or morbid interest in * * * sex," relying on the Court's specific approval of that formulation. See, *e.g.*, *Red Bluff Drive-in, Inc.* v. *Vance*, 648 F.2d 1020, 1026 (5th Cir. 1981) ("shameful or morbid interest in sex"), cert. denied, 455 U.S. 913 (1982); *Penthouse International, Ltd.* v. *McAuliffe*, 610 F.2d 1353, 1363-1364 (5th Cir. 1980) ("shameful or morbid, rather than a healthy, interest"); *United States* v. *Hamling*, 481 F.2d 307, 321 (9th Cir. 1973), aff'd, 418 U.S. 87 (1974) ("shameful or morbid interest in sex"); *Haldeman* v. *United States*, 340 F.2d 59, 62 n.5 (10th Cir. 1965) ("shameful or morbid interest

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(1954) (materials are obscene if they "incite lascivious thoughts, arouse lustful desire"); *Adams Theatre Co.* v. *Keenan*, 12 N.J. 267, 272, 96 A.2d 519, 521 (1953) (citation omitted) (Brennan, J.) (question is whether "dominant note of the presentation is erotic allurement 'tending to excite lustful and lecherous desire' ").

in sex"); 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 62.06 (3d ed. 1977) ("the principal appeal * * * must be to a morbid interest in sex, as distinguished from a candid interest in sex"). Other courts, however, have pointed to the reference to the word "lustful" in the *Roth* opinion, and have defined "prurient interest" in terms of "lust." See, *e.g.*, *United States* v. *35 MM. Motion Picture Film*, 432 F.2d 705, 711 (2d Cir. 1970) ("lustful" connotes "a sense of debasement, of subnormal furtiveness or guilt"); *Childs* v. *Oregon*, 431 F.2d 272, 275 (9th Cir. 1970) (defining "prurient interest" in terms of "lascivious thoughts" and "lustful desires" is not impermissible in light of *Roth*); *Flying Eagle Publications, Inc.* v. *United States*, 273 F.2d 799, 803 (1st Cir. 1960) (material appealing to prurient interest is "material having a tendency to excite lustful thoughts"); *Universal Film Exchanges, Inc.* v. *City of Chicago*, 288 F. Supp. 286, 294 n.5 (N.D. Ill. 1968) (same); *Big Table, Inc.* v. *Schroeder*, 186 F. Supp. 254, 259 (N.D. Ill. 1960) (same).

By referring to several different definitions of the term "prurient," and by approving the instructions given in the cases under review in *Roth*, this Court made it clear that the legal meaning of "prurient interest" is not restricted to the exact language of the Model Penal Code. Any similiar formulation of the concept of "prurience" plainly is acceptable, as long as it connotes an unhealthy or unwholesome interest in sex. Indeed, in a case decided shortly after *Roth*, the First Circuit made just that point. In *Flying Eagle Publications, Inc.* v. *United States*, 273 F.2d 799 (1st Cir. 1960), the court noted the various terms that the *Roth* Court had used in defining "pru-

rient interest," and concluded that these terms—including the term "lustful"—were meant to suggest "material which excites an unwholesome or unhealthy interest in sex." 273 F.2d at 803.

The court of appeals also concluded that even if *Roth* and *Miller* authorized the use of "lust" to define "prurient interest," that definition is no longer permissible because the contemporary usage of "lust" connotes only "sexual desire" (84-28 J.S. App. 67a). The court of appeals erred by ignoring the well-established legal meaning of "lust" and basing its decision on its view of the contemporary meaning of that term. This Court in *Miller* v. *California*, *supra*, indicated that it is the judicial meaning of terms, not their common usage, that is relevant for the purposes of constitutional analysis. 413 U.S. at 18 n.2. Cf. *Morissette* v. *United States*, 342 U.S. 246, 263 (1952).

Moreover, the court of appeals' assumption regarding the contemporary usage of "lust" is incorrect. Modern dictionary definitions of "prurient" are consistent with both the *Roth* definition and the definition in the Washington statute. The leading dictionaries define "prurient" by using words such as "lustful," "lascivious," "lewd," and "lecherous." See *Webster's Third New International Dictionary of the English Language* 1829 (1981); *Webster's New World Dictionary of the American Language* 1145 (college ed. 1972); *American Heritage Dictionary of the English Language* 1054 (college ed. 1976); *Black's Law Dictionary* 1104 (5th ed. 1979). Indeed, one of the most respected modern American dictionaries defines "prurient" as "causing lasciviousness or lust" —almost exactly the same definition that is used in the Washington statute. See *Random House Dictionary of the English Language* 1158 (1966).

The words "lust" and "lustful" are similarly defined by reference to terms such as "lecherous," "lascivious," and "libidinous." See *Webster's Third New International Dictionary of the English Language*, *supra*, at 1348. Other related terms, such as "salacious" and "lewd," are in turn defined by reference to the word "lustful." See *Webster's Third New International Dictionary of the English Language*, *supra*, at 1301, 2002; *Webster's New World Dictionary of the American Language*, *supra*, at 842, 1285; *American Heritage Dictionary of the English Language*, *supra*, at 752, 1144. Each of these related terms carries a slightly different connotation, but the core meaning is the same: an excessive, illicit, unhealthy, or unwholesome interest in sex. The meaning of the word "lust" therefore is not restricted to simple "sexual desire" as the court of appeals concluded in this case, and the Washington statute's use of "lust" to define "prurient" is consistent with the modern understanding of those terms.

It is especially clear that the word "lust," as used in the Washington statute, is meant to carry the connotation of unwholesomeness, because "lust" is used in the statute in conjunction with the word "lasciviousness." See *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Accordingly, when read in context, the Washington statute's definition of "prurient" as "that which incites lasciviousness or lust" plainly suggests the arousal of an unwholesome sexual desire. That definition conforms both to the legal concept of "prurient interest" that this Court discussed in *Roth* and to the common understanding of the term "prurient" in modern parlance. The State's use of the term "lust"—and its failure

to adhere strictly to the Model Penal Code definition of "prurient interest"—therefore provides no basis for declaring the Washington obscenity statute void on its face.

II. The Washington Statute Is Not Invalid Under The "Overbreadth" Doctrine

Even if the Court were to conclude that the definition of the term "prurient" in the Washington statute potentially may be flawed in some respect, the judgment of the court of appeals nonetheless should be reversed, because that court erred by declaring the statute facially void.

1. The court of appeals ruled that parties challenging a statute on First Amendment grounds may obtain an immediate federal court resolution of the merits of their claims simply by asserting that the law is overbroad. By adopting that approach, the court of appeals misapplied the "overbreadth" doctrine fashioned by this Court in *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), and its progeny.

The traditional rule is that "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York* v. *Ferber*, 458 U.S. 747, 767 (1982) (collecting cases). The First Amendment overbreadth doctrine is a limited exception to this rule. It permits a party whose actions are not immune from punishment under a properly-drafted law to challenge the constitutionality of a "sweeping statute, or one incapable of limitation" (*New York* v. *Ferber*, 458 U.S. at 772), on the ground that the statute's breadth impermissibly "chills" the exercise of protected speech

by third parties not before the court. See *City Council* v. *Taxpayers for Vincent*, No. 82-975 (May 15, 1984), slip op. 8-10; *New York* v. *Ferber*, 458 U.S. at 768-769 (collecting cases). Since it is " 'difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application,' " (*New York* v. *Ferber*, *id.* at 772 n.27 (citation omitted)), the Court has limited the doctrine to those instances in which the statute is substantially overbroad, *i.e.*, when the statute is unconstitutional "in a substantial portion of the cases to which it applies" (*Regan* v. *Time, Inc.*, No. 82-729 (July 3, 1984), slip op. 8 (plurality opinion)), and there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court" (*City Council* v. *Taxpayers for Vincent*, slip op. 9-10; see also *New York* v. *Ferber*, 458 U.S. at 770; *Broadrick* v. *Oklahoma*, 413 U.S. at 615).

The court of appeals in this case held (84-28 J.S. App. 57a-58a) that this limiting principle does not apply when the challenged statute regulates speech rather than conduct. This Court expressly rejected that contention in *New York* v. *Ferber*, *supra*. In that case, the New York Court of Appeals had concluded that the substantiality requirement enunciated in *Broadrick* v. *Oklahoma*, *supra*, did not apply to a challenge to a state law prohibiting the distribution of material depicting the sexual performance of children under 16 "because the challenged statute, in its view, was directed at 'pure speech.' " 458 U.S. at 766.

This Court rejected the state court's distinction between "speech" and "conduct," on the ground that such a distinction failed to reflect "the purpose and

nature of the [overbreadth] doctrine." 458 U.S. at 772. The Court explained that the degree to which an overbroad statute chills the exercise of protected activity turns on the scope of the statute, not on the activity it affects. The Court therefore found "no appreciable difference" between the effect that an allegedly overbroad statute would have upon a bookseller deciding whether to distribute a particular magazine and its effect upon a state employee deciding whether to participate in a political campaign. *Ibid.* In fact, the Court noted that the bookseller's economic incentive to distribute the publication might well lessen, if not offset, any deterrent effect caused by the statute. *Ibid.*

When analyzed under the principles set forth in *Broadrick* v. *Oklahoma*, *supra*, and *New York* v. *Ferber*, *supra*, it is clear that the Washington statute is not substantially overbroad. The court of appeals erred by seizing upon the term "lust" and assessing the chilling effect of the statute by reference to that term alone, instead of examining the relationship between that term and the reach of the statute. The Washington statute incorporates all three elements of the *Miller* test for obscenity, and the definition of "prurient interest" therefore does not by itself prescribe the scope of the Act. Even if the term "lust" had the broad definition postulated by the court of appeals, the statute would reach only material "[w]hich explicitly depicts * * * patently offensive representations or descriptions" of specific sexual conduct (84-28 J.S. App. 1a) and "[w]hich, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value" (*ibid.*).

Under these circumstances, the Washington statute is not nearly so expansive as the court of appeals believed. The court of appeals found great significance in the difference between its view of "lust" as mean-

ing arousal of sexual desire, and what it viewed as the proper definition of "prurient"—inciting a "shameful or morbid interest in * * * sex" (84-28 J.S. App. 69a). Yet any materials satisfying the two unchallenged elements of the statutory test—patently offensive representations of specific sexual conduct which lack literary, artistic, political, or scientific value—would be unlikely to arouse a healthy "sexual desire," instead of a "shameful or morbid interest in sex." The allegedly overbroad definition of "prurient" thus would result in only a marginal expansion of the scope of the statute, and could have only a very small deterrent effect on protected speech (see *New York* v. *Ferber*, 458 U.S. at 772). Therefore, the statute cannot be deemed "substantially overbroad."

Application of the "overbreadth" doctrine in this case is particularly inappropriate for two additional reasons. First, obscenity regulation has been so thoroughly scrutinized under the First Amendment that statutes and ordinances governing obscene materials normally are drawn along the now-familiar lines of the three-part *Miller* test. Many statutes, like the Washington statute, even track the exact language used by the Court in *Miller* (see, *e.g.*, *Red Bluff Drive-In, Inc.* v. *Vance*, 648 F.2d at 1026). Because the Washington legislature obviously attempted to incorporate into House Bill 626 the constitutional standards for obscenity set forth in *Miller* v. *California*, *supra*, it hardly seems likely that the definition of "prurient" was designed to undermine the limitations of the *Miller* test and to extend state regulation beyond the boundaries set by this Court.[8]

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[8] The Washington Supreme Court's interpretation of a predecessor statute as adopting the *Miller* test (*State* v. *J-R Distributors, Inc.*, 82 Wash. 2d 584, 512 P.2d 1049 (1973), cert. denied, 418 U.S. 949 (1974)) bolsters this conclusion.

Second, because the substantive law governing the regulation of obscenity has been shaped largely by judicial decisions, particularly the decisions of this Court, the federal and state statutes regulating this subject have in effect been supplemented by a substantial body of caselaw. The plain text of the statutes no longer provides a complete answer to any question that may arise as to their scope, or their constitutionality. Hence, a statute that allegedly departs from the prevailing judicial test for obscenity is not likely to deter conduct or speech because it is limited by the detailed constitutional guidelines established by this Court.

2. Even if the court of appeals were correct in its view that a broad construction of the term "lust" would have a significant chilling effect on protected First Amendment activity, the court still should have stayed its hand to await a definitive construction of that term by the Washington state courts. This Court has long recognized that proper regard for the respective roles of federal and state tribunals in resolving constitutional attacks on state statutes requires that substantial weight be given to the costs of premature and avoidable federal interference with the enforcement of state laws. See, *e.g.*, *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941). The values served by abstention are especially important where, as here, the statute under attack is designed to implement the State's historic and powerful interest in "the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself" (*Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 58 (1973)), and where, as here, federal intervention threatens to nullify a comprehensive regulatory

scheme that the state courts have had no opportunity to construe (*Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289, 306-312 (1979)).

It is no answer to say, as did the court of appeals, that abstention is inappropriate because House Bill 626 unequivocally uses the word "lust," and that "lust" is not subject to a narrow construction that would render it constitutionally unobjectionable. This Court has cautioned against "assum[ing] that the [state] courts will widen the possibly invalid reach of the statute by giving an expansive construction" to a challenged provision. *New York* v. *Ferber*, 458 U.S. at 773; see also *Regan* v. *Time, Inc.*, slip op. 9-10 & n.8 (plurality opinion). That principle applies with special force in a case such as this one, where the state courts have expressed their willingness to construe state obscenity laws in accordance with this Court's decision in *Miller* (see *State* v. *J-R Distributors, Inc.*, 82 Wash. 2d 584, 512 P.2d 1049 (1973), cert. denied, 418 U.S. 949 (1974)).[4]

In sum, if this Court were to conclude that the contemporary definition of the term "lust" could potentially render the Washington statute overbroad, this case would plainly be among those "that call most insistently for abstention" (*Harris County*

---

[4] Given the host of alternative and constitutionally unchallengeable constructions of the term "lust," a federal court would not assume that Congress intended to adopt an unconstitutional definition of that term. See *United States* v. *12 200-Ft Reels of Super 8MM. Film*, 413 U.S. 123, 130 n.7 (1973). See also *Regan* v. *Time, Inc.*, slip op. 8-10 (plurality opinion); *New York* v. *Ferber*, 458 U.S. at 769 n.24. It therefore ill behooves a federal court to assume, without any support in the state legislative record, that a state court would rule that the state legislature intended to embrace a constitutionally questionable definition.

Comm'rs Court v. *Moore*, 420 U.S. 77, 84 (1975)). Since the Washington state legislature obviously sought to conform House Bill 626 to the requirements set forth in this Court's decision in *Miller*, the State's own courts should be given the opportunity to resolve any doubts concerning the scope of the statute. For a federal court to rush to invalidate the State's legislative efforts in this setting is to invite the kind of "needless friction" between the federal courts and the States that the abstention doctrine was designed to avoid. *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. at 500. Because that harm could easily be avoided simply by awaiting a definitive construction of the statute from the state courts, abstention clearly would be the proper course.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

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v.

J-R DISTRIBUTORS, INC., *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS

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QUESTION DISCUSSED

Is it unconstitutional to include the word "lust" in a statutory definition of "prurient interest?"

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I

INTEREST OF AMICUS AND EXPERIENCE OF COUNSEL

Concerned Women for America Education and Legal Defense Foundation is a national, non-profit membership organization with over 500,000 members. At its annual convention held in Washington, D.C., on September 14 and 15, 1984, it adopted the following resolution:

> We call for the strict enforcement of laws against pornography. Crimes against women and children are ever increasing as a result of the antisocial decadence of the peddlers of obscenity.

Counsel of record for this amicus brief is General Legal Counsel for Concerned Women for America. He was previously in practice in Olympia, Washington. Counsel was the actual draftsman of the Washington state law before the court in this case, House Bill 626. Counsel drafted the definition of "prurient interest" which is the principal constitutional issue before this court.

II

THE DRAFTSMAN'S RATIONALE FOR DEFINING THE TERM "PRURIENT INTEREST"

As indicated by the Ninth Circuit Court of Appeals in its opinion below, *J-R Distributors, Inc.* v. *Eikenberry,* 725 F.2d 482, 484 (1984), House Bill 626 was indeed an effort to refine the 1977 anti-pornography initiative adopted by the voters of Washington state which was subsequently declared unconstitutional. *Spokane Arcades, Inc.* v. *Brockett,* 631 F.2d 135, 137-39 (9th Cir. 1980); *aff'd,* 454 U.S. 1022, 102 S.Ct. 557, 70 L.Ed.2d 468 (1981).

The definition of the term "prurient interest" originated from a different legal situation, however. In various obscenity prosecutions in the state, jurors were expressing confusion over the term "prurient interest." Counsel for the defendants in such cases were arguing that "a shameful or morbid interest in sex" referred to "such things as bestiality, sado-masochism and sexual exploitation of children" and not heterosexual activity between adults. See, Spokane *Daily Chronicle,* March 15, 1977, p. 3, "Films Held Not Obscene, More Prosecutions Likely," attached as Appendix A. Similar legal arguments have been noted in other cases. See, e.g., *United States* v. *Bagnell,* 679 F.2d 826, 836 (11th Cir. 1982).

The purpose of this definitional section was to end juror confusion and to aid trial judges in defining the term "prurient interest" in ordinary language consistent with both the ordinary meaning of the word "prurient" and the decisions of this Court.

When drafting this term, counsel first reviewed the decisions of this Court. The decision of *Roth* v. *United States,* 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 2d 1498 (1957), of course, contains the original definition of that term. This court noted that an example of material appealing to the "prurient interest" was "material having a tendency to excite lustful thoughts." *Roth,* 354 U.S. at 487 n. 20, 77 S.Ct. at 1310 n. 20. Review of later cases of this Court indicated nothing to this draftsman which would render this language in *Roth* to be inappropriate.

House Bill 626 was drafted in the law library of the Supreme Court of the State of Washington. This draftsman then turned to the principal unabridged dictionary in that library for assistance with the ordinary meaning of the word "prurient." This dictionary was *Webster's New International Dictionary* (Unabridged, 3d ed. 1961). The key definition in said dictionary which was used was "tending to incite lasciviousness." This dictionary defines lascivious as "inclined to lechery, lewd, or lustful tendencies."

Based on this Court's footnote in *Roth* and the dictionary definition of both "prurient" and "lascivious," this draftsman wrote the definition of "prurient interest" now found in House Bill 626, to wit: "that which incites lasciviousness or lust." This definition seemed to fit all the objectives of drafting: compliance with the rulings of this Court, adherence to the dictionary definition, and the use of ordinary language to end juror confusion.

It is, of course, the inclusion of the single word "lust" in House Bill 626 which was the basis of the Ninth Circuit's ruling that the bill was unconstitutional.

III

CONSTITUTIONAL DECISIONS SHOULD NOT BE PREMISED ON THE DICTIONARY THE LEGISLATIVE DRAFTSMAN HAS AVAILABLE

Apparently the Ninth Circuit had the 1976 version of *Webster's New International Dicitonary* (Unabridged, 3d ed.), while the Washington State Supreme Court law library contained the 1961 version. Such a fact should not give rise to a constitutional distinction rendering a law of the State of Washington unconstitutioinal on such a slender reed.

If one checks the unabridged dictionaries in the United States Supreme Court library one will discover that these dictionaries would lead a draftsman to the same conclusion as was reached while drafting in the State of Washington.

This Court's library contains the following: *The Oxford English Dictionary* (Unabridged, 1933); "prurient: given to the indulgence of lewd ideas; impure minded; characterized by lasciviousness of thought or mind"; "lascivious: inclined to lust, lewd, wanton; inciting to lust or wantonness." *Webster's New Twentieth Century Dictionary* (Unabridged, 2d ed. 1979); "prurient: inclined or disposed to lewdness or lascivious thoughts; having lustful ideas or desires." *The Randon House Dictionary of the English Language* (Unabridged, 1966); "prurient: having, inclined to have, or characterized by lascivious or lustful thoughts, desires, etc.; causing lasciviousness or lust." *Webster's New International Dictionary* (2d ed., 1945); "prurient: of

person's having itching, morbid or lascivious longings"; "lascivious: [see lust] wanton, lewd, lustful."

It is clear then that every unabridged dictionary available in this Court's library defines the term "prurient" to mean lasciviousness and lust, either by including both terms in the primary definition, or by defining the term "lascivious" to include the word "lust."

The Ninth Circuit found no constitutional problem in House Bill 626 by the inclusion of the word "lasciviousness" in the definition of "prurient interest." It seems remarkable then that it would be unconstitutional to use the word "lust" as an additional word when it is beyond debate that the terms "lust" and "lascivious" are interchangeable synonyms.

Some members of the public might have trouble giving a specific definition of the term "lasciviousness." There can be no constitutional violation by merely adding a more common synonym to give clarity to the word lasciviousness. Simplicity in legislative drafting should be recognized as a desirable goal, not an unconstitutional action.

There is nothing in any decision of this Court which dictates that the use of the *Roth* footnote or the ordinary dictionary definition of the word "prurient" is constitutionally impermissible. It boggles the imagination to suggest that the draftsmen of the First Amendment intended any such definitional nitpicking.

THE COURT OF APPEALS FAILED TO RECOGNIZE THAT THE TERM PRURIENT IS ONLY ONE ELEMENT NECESSARY TO ACHIEVE A FINDING OF OBSCENITY

It should be noted at the outset that the members of Concerned Women for America do not share the Ninth Circuit's enthusiasm for "good, old-fashioned, healthy lust." 725 F.2d at 492. Apparently the court of appeals' zealous regard for lust blinded their legal judgment. the lower court failed to even note that appeal to the prurient interest is only one element necessary to a finding of obscenity under House Bill 626. As dicated by this Court's decision in *Miller* v. *California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed. 2d 419 (1973), House Bill 626 requires that *all* of the following elements be proven in order to sustain a finding of obscenity:

1. The average person, applying contemporary community standards, would find [the material], when considered as a whole, appeals to the prurient interest; *AND*

2. [the material] depicts or describes patently offensive representations of or descriptions of:

(a) ultimate sex acts, normal or perverted actual or simulated; or

(b) masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibtion of the genitals or genital area; or

(c) violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; *AND*

3. which when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political or scientific value.

A mere finding that the prurient interest or lustfulness is present will not suffice. All three elements must be present. The material must appeal to the prurient interest *and* contain some type of patently offensive representation of the type of ultimate sex acts listed *and* lack serious literary, artistic, political, or scientific value.

The suggestion that "it might be necessary to hale into court our leading couturiers, perfumers and manufacturers of soft drinks, soap suds and automobiles," [725 F.2d at 492] is ludicrous. A mere finding that an appeal to lust is a part of a presentation is not enough. Your amicus is not aware of any perfume ads or soft drink ads which contain patently offensive representations of ultimate sex acts of the type listed in House Bill 626.

Simply stated, House Bill 626 does not outlaw "good, old-fashioned, healthy lust." It merely outlaws patently offensive presentations of ultimate sex acts, which appeal to the lustful interest in sex, and which lack serious literary, artistic, political, or scientific value.

The only thing "overbroad" in this case is the imagination of the Ninth Circuit which conjures up cases against Pepsi Cola and Chanel No. 5. Until Pepsi and perfume are peddled with patently offensive ultimate sex acts as part of their message, there is no danger from House Bill 626.

V

CONCLUSION

The State of Washington is entitled to outlaw obscene presentations as defined by this Court. In drafting its law, it is not constitutionally impermissible to rely on this Court's definition in *Roth*. Neither is it unconstitutional to

use an ordinary dictionary definition of the term prurient to end confusion on the part of jurors.

It is time to end the nitpicking in the area of obscenity law. The presence of the word "lust" is constitutionally permissible. The people of the State of Washington have been trying since 1977 to create a constitutionally sound obscenity law. According to the Ninth Circuit, this effort falls one word short. This Court should reverse this unwarranted interference in the legitimate exercise of legislative authority by the people of the State of Washington and their elected officials.

Respectfully submitted,

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APPENDIX A

The Appendix below was taken from the Spokane, Washington *Daily Chronicle,* March 15, 1977, Section 1, Page 3.

Films Held Not Obscene; More Prosecution Likely

By JOHN WEBSTER

After six hours of deliberation a four-man, eight-woman Superior Court jury last night found that the films "Deep Throat" and "The Private Afternoon of Pamela Mann" are not obscene.

The jury acquitted the operators of the Dishman Theater, Gaiety Theatres, Inc., and Roger H. Forbes of Seattle, Gaiety's president, of three counts of exhibition of an obscene motion picture, stemming from the two films' showing last year at the Dishman.

The state may not appeal the verdict. Under the law, the prosecution never has a right to appeal a verdict of innocent, although a verdict of guilty may be appealed by a defendant.

However, Pros. Atty. Donald C. Brockett said today that, despite the verdict, Gaiety Theatres and Forbes will be prosecuted on two more recent charges of exhibition of an obscene motion picture.

Those charges, to which the defendants pleaded innocent on Friday, are based on the Jan. 25 showing of the films, "The Evil Ways of Love" and "Behind the Green Door" at the Dishman, which is leased by Gaiety Theatres.

An April 25 Superior Court trial has been scheduled on the two charges.

William J. Powell, a Spokane attorney who represented Gaiety Theatres, said he talked with some of the jurors after the verdict was returned at 10:30 last night and was told the panel decided the films were not obscene in that the two movies, when considered as a whole, did not appeal to the prurient interest of an average person applying contemporary community standards.

The "prurient interest" test was one question the jury had to consider to rule whether the films were obscene.

Powell said jurors told him they were somewhat confused by Lally's instruction to them about the meaning of "prurient interest." The jurors asked Judge John J. Lally to clarify the prurient interest instruction, so at 10 p.m. he read a revised instruction.

The modified instruction said prurient interest "refers to material having a tendency to excite lustful thought, or stated another way, prurient refers to a shameful or morbid interest in nudity or sex."

Less than 30 minutes after receiving that instruction, the jury returned its verdict.

Other tests the jury had to consider in determining the obscenity issue were whether the films portrayed sexual activity in a "patently offensive" way, and whether the films, when considered as a whole, lacked any serious literary, artistic, political or scientific value.

All three of those factors had to be true for a guilty verdict.

Forbes was represented by Spokane attorney Bryan Harnetiaux and Robert Smith of Atlanta. Smith has

argued before the U.S. Supreme Court about 12 times in obscenity cases, and is regarded as a specialist in the field of law of obscenity.

In his final argument to the jury, Smith said it is the community standard here that such things as bestiality, sado-masochism and sexual exploitation of children are obscene and should be suppressed.

But "Deep Throat" and "Pamela Mann" do not portray such acts, Smith told the jury, adding, "the kinds of sex depicted here may not be for us, but it is important to a lot of people in our community."

Discussing the social ideal of a harmonious marriage and obedient children, and divorce rates which indicate many do not reach that ideal, Smith turned to the subject of community values as to what is acceptable in X-rated movies.

"When we talk about community standards, we talk about what is, not some unattainable goal," the attorney said.

He had presented testimony that films such as "Deep Throat" and "Pamela Mann" are of value in therapy for persons with sexual dysfunctions, and he told the jury that "if a film is of value to any segment of our society you must acquit, like it or not."

Repression is never good for the sexual health of the community," Smith argued.

MOTION FILED

NOV 15 1984

Nos. 84-28 and 84-143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DONALD C. BROCKETT, ET AL.,

Appellants,

— against —

SPOKANE ARCADES, INC., ET AL.,

Appellees.

KENNETH EIKENBERRY, ET AL.,

Appellants,

— against —

J-R DISTRIBUTORS, INC., ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

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ON APPEAL FROM THE UNITED STATES

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

Morality in Media, Inc. hereby respectfully moves for leave to file the attached brief amicus curiae in support of the Appellants in the above matter for which probable jurisdiction has been noted and for which oral argument has been granted. The consent of the attorneys for the Appelants has been granted. The consent of the attorneys representing the American Civil Liberties Union of Washington, et al., was requested but refused.

INTEREST OF MORALITY IN MEDIA, INC.

Morality in Media, Inc. is a New York not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combatting the distribution of obscene material in the United States. This organization, now national in scope, has affiliates in six states and in Puerto Rico. It corresponds 8 times a year with

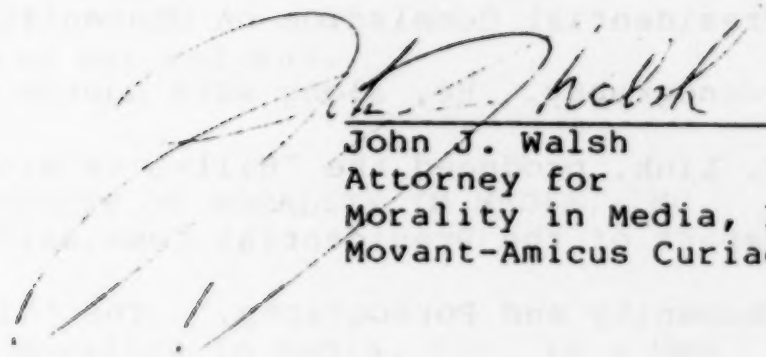
over 50,000 recipients of its newsletter located in every state of the United States. Its Board of Directors and National Advisory Board are composed of prominent businessmen, clergy and civic leaders. Its national headquarters is located at 475 Riverside Drive, New York, New York 10115.

The president of Morality in Media, Inc. is Reverend Morton A. Hill, S.J. In 1968 Father Hill was appointed to the Presidential Commission on Obscenity and Pornography. He, along with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography." The "Hill-Link Minority Report" was cited by this honorable Court in Kaplan v. California, 413 U.S. 115, 120 n.4 and in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59 n.7 and n.8 (1973).

Morality in Media, Inc. files this motion and brief supporting the position of

the State of Washington because it believes that the decision in this matter will be of grave importance to the constitutionality of the obscenity laws of several states. It believes that its brief contains arguments not fully discussed by the parties.

Respectfully submitted,



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BRIEF AMICUS CURIAE

Statement of Interest

As more fully explained in the accompanying motion, Morality in Media, Inc.

is a non-profit organization dedicated to combatting obscenity, pornography and indecency in media. Morality in Media, Inc. is before this honorable Court as amicus curiae to urge that the Washington anti-obscenity law be upheld as constitutional.

SUMMARY OF ARGUMENT

Morality in Media, Inc. contends that the use of the term "lust " in the State of Washington's anti-obscenity statute is a constitutional approach to defining the concept of "prurient." this honorable Court has indicated that the use of the term "lust" is proper in the obscenity field, and this view cannot be overruled through the concept of an alleged change in the meaning of words. The case law supports this use of the word "lust."

ARGUMENT

THE USE OF THE TERM "LUST" AS PART OF THE DEFINITION OF "PRURIENT" IN THE WASHINGTON OBSCENITY STATUTE IS CONSTITUTIONAL.

A. Roth Is Still Good Law

The Washington Anti-Obscenity Law incorporates the term "lust" in the definition of "prurient" in Section 1(8). Such an application does not render the statute unconstitutional. The case law clearly indicates that "lust" is an acceptable element of the test for obscenity as decided by this honorable Court.

In Roth v. United States, 354 U.S. 476 (1957), the Supreme Court capsulized the definition of obscenity as "material which deals with sex in a manner appealing to prurient interest." Roth, 354 U.S. at 487. The Court defined "prurient interest" at note 20 as "a tendency to excite lustful thoughts." The Court then remarked in the

same footnote that the meaning of obscenity "developed in the case law" was not significantly different from the definition suggested in the American Law Institute ("A.L.I.") Model Penal Code. The Model Code states that "a thing is obscene if, considered as a whole, its predominant appeal to is prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." A.L.I. Model Penal Code §207.10(2) (Tent. Draft No. 6, 1957).

An examination of the cases relied on by Roth to develop its definition show that the appeal to lust or lasciviousness is the root of the Roth formulation. This case law defines prurient in terms of the ability to "stir the sex impulses to lead to sexually impure and lustful thoughts," United States v. One Book Called "Ulysses," 5 F. Supp. 182

at 184 (S.D.N.Y. 1933); whether the publication "has a libidinous effect" or "tend[s] to promote lust," United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705 at 707 (2d Cir. 1934); whether it "suggests impure or libidinous thoughts, must invite to lewd and lascivious practices and conduct, must be offensive to chastity, must incite dissolute acts, must create a desire for gratification of animal passions, must encourage unlawful indulgences of lust, must attempt to satisfy the morbid appetite of the salacious, must pander to the prurient taste," Commonwealth v. Gordon, 66 D. and C. 101 at 132 (Philadelphia Co. 1949),"erotic allurement tending to excite lustful and lecherous desire," Adams Theatre Co. v. Keenan, 96 A.2d 519 at 521 (N.J. Sup. Ct. 1953); the tendency is to "excite lustful and lecherous desire." Bantam Books v. Melko, 96 A.2d 47, 58 (1953), quoting People v.

Wendling, 258 N.Y. 451 (1932). "Its calculated purpose or dominant effect is substantially to arouse sexual desires," American Civil Liberties Union v. City of Chicago, 121 N.E. 2d 585 at 592 (Sup. Ct. Ill. 1954) (citations ommitted and emphases added).

In Walker v. Popenoe, 149 F.2d 511 (D.C. Cir. 1940) the court said:

> If a publication as a whole is not stimulating to the senses of the ordinary reader, it is not within the statute. It would make nonsense of the statute to hold that it covers works of value and repute merely because their incidental effects may include some slight stimulation of the senses of the ordinary reader. The dominant effect of an entire publication determines its character. 'The standard must be the likelihood that the work will so much arouse the salacity of the reader to whom it is sent as to outweigh any literary, scientific or other merits it may have in the reader's hands.' (quoting

> United States v. Levine, 83 F.2d 156 (2d Cir. 1936)) (emphasis supplied).

In Roth v. Goldman, 172 F.2d 788, 794 (2d Cir. 1949), the concurring opinion stated:

> [A]t one time, a writing was held obscene if it would probably have a socially undesirable effect on the abnormal; but now the test has shifted and become that of the way the words will probably affect normal persons.

It is clear that Roth and the cases upon which it relies describe prurient in terms of an arousal of lust.

The Roth case has not been rejected by the Miller Court. On the contrary, Roth has been cited with approval in the Miller case as well as numerous other decisions by this Court, including New York v. Ferber, 457 U.S. 747 (1982), Smith v. United States, 431 U.S. 291 (1977), F.C.C. v. Pacifica Foundation, 438 U.S. 726, 745 (1978), Pinkus

v. United States, 436 U.S. 293, 299 (1978), Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973) and many others. In Hamling v. United States, 418 U.S. 87, 11112 (1974) this Court stated:

> Other decisions dealing with the pre-Miller constitutionality or interpretation of 18 USC §1461 [18 USCS §1461] in other contexts have not retreated from the language of Roth. See e.g., United States v. Reidel, 402 U.S. 351, 28 L.Ed.2d 813, 91 S. Ct. 1410 (1971); Ginzburg v. United States, 383 U.S. 463, 16 L.Ed.2d 31, 86 S. Ct. 942 (1966); Manual Enterprises, Inc. v. Day, 370 U.S. 478, 8 L.Ed.2d 639, 82 S. Ct. 1432 (1962).

Roth, far from being outdated by the ravages of time or changes in the connotations of language, is still a vital case today.

B. Miller Did Not Change Roth

The original Roth test was made more

concrete in Miller v. California, 413 U.S. 15 (1973). Although the Miller Court added two prongs to the original test, it did not attempt to change the concept of "prurient." Prurience is mentioned in footnotes 1 and 2 of Miller. In footnote 1, this Court does cite the definition of prurience as given in the A.L.I. Model Penal Code but does not adopt it. Since this is the definition adopted by the California legislature and Miller is a California case, the citation to this definition adds no weight to the argument that this is the accepted definition.

C. The A.L.I. Definition Has Never Been Adopted By This Honorable Court

In deciding that the Washington law is overbroad in its use of the term "lust," the court below asserts that, since the A.L.I. definition is given last, this Court evidently meant for that alternative to be

the proper definition of prurient interest. This is a complete non-sequitur and defies reason. The Court "defined" prurient in terms of an appeal to lust. While it mentioned the A.L.I. formulation, it did not adopt it. Certainly the fact that the A.L.I. version is mentioned "last" creates no preference known to law.

The use of the introductory signal "i.e." meaning "that is" (from the Latin "id est"), signifies that the subsequent phrase "a tendency to excite lust" is the definition of prurient interest. By the use of "i.e.", nothing could be clearer that the intent is to define prurient interest, not give an example of prurient interest. Further evidence of this view is the appearance of the word "lustful"[1] in the tests applied by

---

1. The Roth Court noted that each trial court had given a jury instruction which included "lustful." 354 U.S. at 486. The Court then stated: "Both trial courts below sufficiently followed the proper standard. Both courts used the proper definition of obscenity." 354 U.S. at 489.

the trial judges that gained approval in the Roth holding.

This Court in Miller clarified the original Roth test. These additional elements to the obscenity test require that, before material is to be found obscene, it must depict or describe sexual conduct in a patently offensive way, and considered as a whole, it must lack serious literary, artistic, political or scientific value. It is possible, therefore, that material may have a "tendency to excite lustful thoughts" and thus be "prurient" but not obscene. The fact that prurient interest is not the keystone for determining obscenity, but rather is just one element of a three-prong test, contradicts the majority's argument that material that has "a tendency to arouse lustful thoughts and desires" would be obscene under the Washington statute.

The majority below notes that the Washington statute tracks the Miller test. Within the same opinion, the court claims that, to assure that protected speech is not

impermissibly regulated, "even subtle deviations from the Miller standards must be carefully examined." But the Washington Statute does not deviate from Miller; such an argument is a straw man.

D. The Meaning of "Lust" Has Not Changed

The court below also contends that the connotations that accompany the word "lust" have significantly changed since 1957. The court presents no studies, statistics, or other credible evidence that the phrase "incites lasciviousness or lust" means anything different in 1984 than in 1957. As Justice Wallace says: "The Supreme Court has not adopted the definitional change as embodied by the majority."

Webster's New World Dictionary (Second College Edition, 1978) defines "shameful" as "not just, moral, or decent; offensive." (emphasis added). The same reference work defines "lust" as "sexual desire b) excessive

sexual desire, esp. as seeking unrestrained sexual gratification." In Webster's New Collegiate Dictionary (1976), "shameful" is defined as "disgraceful" and "indecent", and "lust" is defined as "intense sexual desire, lasciviousness, an intense longing." Certainly, according to these dictionary definitions, a statute incorporating the concept of lust will not fall beyond constitutional limits as set by this Court.

E. The Carter Interview is Irrelevant

While a dictionary is a possible source of a word's contemporary usage, a single interview with a public figure--even an individual who has become President of the United States--is not. The majority opinion in the lower court cites a 1976 Playboy Magazine interview with Jimmy Carter in which he admitted that he had '"looked on a lot of women with lust [and]...committed adultery in my heart many times."' Aside from the

absurdity of claiming that this statement is reflective of the average person's contemporary usage of the word, Judge Wallace in his opinion notes that Carter "characterized lust as sin requiring divine forgiveness." This fact dispels the majority's argument that he "was expressing a healthy, wholesome, human reaction common to millions of well-adjusted persons."

F. The Case Law Supports The Use of the Term "Lust"

Many cases, including those cited by the majority below and by Judge Wallace, have held lust to be a proper definition of prurient. A few examples are in order.

One state court decision mentioned by Judge Wallace upholds jury instructions which use the "tendency to excite lustful thughts" approach, even though that state's obscenity statute employs the language of the A.L.I. Model Penal Code. In Spry v. State, 279

S.E.2d 2 (1970), a Georgia appellate court held that a lower court's instructions to the jury that material which appeals to prurient interest "has a tendency to excite lustful thoughts" is a "correct statement of law" and "gave the jury a better understanding of prurient interest." Spry, supra at 5.

In Turoso v. Cleveland Municipal Court, 674 F.2d 486 (6th Cir.), cert. denied, 459 U.S. 880 (1982), the Sixth Circuit upheld a definition in the Ohio state statute, Ohio R.C. §2907.01(F)(2) and (3):

> (F) When considered as a whole, and judged with reference to ordinary adults [sic]. Or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to such group, any material or performance is "obscene" if any of the following apply:
> (1) Its dominant appeal is to prurient interest;
> (2) Its dominant tendency is to arouse lust by display or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent

> human beings as mere objects of sexual appetite;
>
> (3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;
>
> 674 F.2d at 491 (emphasis added).

Red Bluff Drive-In v. Vance, 648 F.2d 1020 (5th Cir. 1981), cited by the court below, far from approving the "shameful or morbid" language, merely stated:

> [T]he lack of a definition for the term "prurient interest" does not render the statute constitutionally deficient. Many jurors may find it helpful to learn that "prurient interest" means shameful or morbid but no conviction has, to our knowledge, been overturned for a trial court's failure to so instruct a jury.

Red Bluff Drive-In v. Vance, supra, at 1026. See also, Fletcher v. State, 633 S.W.2d 895, 896 (Tex. Ct. Crim. App. 1982), at 896. Red Bluff and Fletcher stand for the proposition that no definition for prurient appeal is required.

In Bohin v. State, 274 S.E.2d 592, 594 (1980), a Georgia appellate court cited Roth and approved an instruction to the jury that material "which appeals to the prurient interest is material which has a tendency to excite lustful thoughts."

In State v. Bartanen, 591 P.2d 546, cert. denied Bartanen v. Arizona, 444 U.S. 884 (1979), the Supreme Court of Arizona affirmed these jury instructions:

> The term appeal to the prurient interest means to excite lustful thoughts, a shameful or morbid interest in sex or nudity, arouse sexual desires or sexually impure thoughts, inclined to or disposed to lewdness, having lustful ideas or desires.
>
> 591 P.2d at 550 (emphasis added).

The court said at 552:

> We believe the trial court correctly instructed the jury. A.R.S. § 13-531.01(2)(a) stated that an item is obscene when "taken as a whole [it] appeals to the prurient interest." The

> statute also defines specifically the material that is to be considered obscene and the court instructed the jury pursuant to statute. The position taken by the trial court that an "appeal to the prurient interest" is to be judged by both the objective nature of the material and the human instincts which it tends to arouse is correct under the facts of this case. We believe therefore that the instructions, when read as a whole, provided the jury with an adequate and sufficient direction upon which they could reach a proper verdict based on the evidence before them.

In City of Cincinnati v. King, 152 N.E.2d 23, 25, aff'd 159 N.E.2d 767 (1958), an Ohio appellate court defined prurient as "[i]nclined to or charactrized by lascivious thought."

Another significant decision is State ex rel. Dowd v. "Pay the Baby Sitter", 287 N.E.2d 650 (1972). Dowd demonstrates that "prurient" can encompass the two versions in dispute in the existing instant case. The

Ohio court adopted a wide definition for "prurient":

> [T]o excite lustful thoughts; a shameful or morbid interest in sex; arouse sexual desires or sexual impure thoughts; inclined or disposed to lewdness; having lustful ideas or desires.

Dowd, supra at 654 (emphasis added).

The Eikenberry court below failed to cite or otherwise make note of a case from the Ninth Circuit which came to an opposite conclusion on the definition of "prurient interest." In Childs v. State of Oregon, 431 F.2d 272 (9th Cir. 1970), rev'd, 401 U.S. 1006, vacated, 443 F.2d 1177 (9th Cir. 1971) the court stated:

> Even if Childs is read as a departure from Jackson in that it defines "prurient interest" in terms of "lascivious thoughts" and "lustful desires" we do not view this definiton as impermissible in light of Roth v. United States,

> supra, 354 U.S. at 487 n.20 77 S. Ct. 1304.
>
> At least two other federal courts relying on Roth have adopted similar definitions. Flying Eagle Publications v. United States, 273 F.2d 799, 803 (1st Cir. 1960); United States v. Keller, 259 F.2d 54, 58 (3d Cir. 1958).

The Flying Eagle Publications case cited above quotes footnote 20 from Roth without mentioning the A.L.I. "shameful or morbid" definition of prurient interest. In fact, the phrase "material having a tendency to incite lustful thoughts" as well as the dictionary definition quoted in footnote twenty of Roth are cited as the Supreme Court's explanation of "prurient interest."

The Keller case merely cites a dictionary definition of "prurient" with no reference to "shameful or morbid" or any other limitation.

In State v. Barrett, 292 S.E.2d 590 (So. Car. Sup. Ct.), cert. denied, 459 U.S. 1021 (1982), the court decided that the state

statute, which defined prurient interest as "a shameful or morbid interest in nudity, sex or excretion and is reflexive of an arousal of lewd and lascivious desires and thoughts" did not infringe upon the Miller guidelines. In so deciding it referred at 591 to this Court's recognition in Miller of the legislative problems of defining obscenity:

> We emphasize that it is not our function to propose regulating schemes for the states. That must await their concrete legislative efforts.
>
> This Court in Miller noted:
>
> Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." These are essentially

> such standards could be articulated for all 50 States in a single formulation, even assuming the rerequisite consensus exists. When triers of fact are asked to decide whether "the average person, applying contemporary community standards" would consider certain materials "prurient," it would be unrealistic to require that the answer be based on some abstract formulation.
>
> Miller, supra at 30.

There is no hard and fast rule regarding the definitions of many concepts in this particular area of the law. Courts have struggled with the meaning of words in this field throughout the history of modern jurisprudence. There is certainly no exception for the definition of lust or the

definition of prurient interest. The case law and statutory law are split. As noted by Judge Wallace in his dissent:

> It is clear in Roth ...that "lustful thoughts" can be a part of the "prurient interest" definition. The majority would eliminate that part of Roth in order to arrive at its conclusion that the State of Washington may not constitutionally include "lust" as even a part of its definition (emphasis added).

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Ninth Circuit Should be reversed. The constitutional guidelines regarding obscenity were handed down by this Court in order to protect freedom of expression. Since the Washington statute follows these guidelines, it should not be struck down as unconstitutional for its use of "lust."

In defining "prurient" as "that which incites lasciviousness or lust," the Washington legislature was well within the case law that approves the use of the term "lust." The statute should not be struck down if the legislature has followed this Court's lead in its choice of terminology.

DATED: November 14, 1984

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November, 1984, one (1) copy of the annexed motion for leave to file a brief amicus curiae and amicus curiae brief were mailed, postage prepaid, to:

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Office - Supreme Court, U.S.
FILED
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No. 84-143

SUPREME COURT OF THE UNITED STATES

October Term, 1983

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Appellants,

v.

J-R DISTRIBUTORS, INC., ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTEREST OF THE AMICI

Amici states are vitally interested in the preservation of the traditional principles of federalism as well as the proper allocation of powers between the federal and state judiciary. Amici states strongly believe that the regulation of obscenity through the abatement of nuisance is an important state objective as shown by the enactment of the various state laws.[1] The invalidating of these state laws on facial overbreadth grounds without any opportunity for the state judiciary to first interpret and limit state laws seriously frustrates the enforcement of these important state laws. Moreover, this preemption of state judicial functions unnecessarily disrupts the delicate

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1. E.g., Arizona Revised Statutes §§ 13-3501, 12-811

balance of federal/state relations and usurps the traditional powers of the state courts. For these reasons, amici states urge this Court to reverse or remand the decision of the Court of Appeals holding the Washington moral nuisance statutes facially overbroad and unconstitutional.

SUMMARY OF THE ARGUMENT

The Court of Appeals should not have struck down the Washington statute on overbreadth grounds. It incorrectly applied the governing precedents in its decision. More glaringly, it either ignored or was unaware of this Court's decision in New York v. Ferber, 458 U.S. 747 (1982), which required the application of the Broadrick "substantial overbreadth" test to this case. The correct application of that test should have led to the affirmance of the Dis-

trict Court's decision. At a minimum, this Court should summarily remand this case to the Court of Appeals for it to apply the correct test.

ARGUMENT

THE COURT OF APPEALS ERRONEOUSLY INVALIDATED THE WASHINGTON STATUTE ON THE FACIAL OVERBREADTH DOCTRINE

The Court of Appeals struck down the entire Washington statute on the ground that it was facially overbroad. The overbreadth analysis was hinged on use of the word "lust" in the definition of the word "prurient". This use of the overbreadth doctrine is precisely what the Supreme Court cautioned against:

> "[T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is the exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise protected behavior that it forbids the State to sanction

> moves from "pure speech" toward conduct and that conduct--even if expressive--falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect--at best a prediction--cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1982).

In Broadrick this Court recognized that the overbreadth doctrine is "strong medicine" and has been employed with hesitation, and then only as a last resort. Id. at 613.

Amici states believe that this "strong medicine" shoud not have been used by the Court of Appeals and that this case does not belong to the "last resort" category. Instead, the Wash-

ington courts should have been given an opportunity to construe the state statute to limit or cure any overbreadth problem.

The Broadrick doctrine was reaffirmed by this Court only a few months ago. In City Council of Los Angeles v. Taxpayers for Vincent, ___ U.S. ___, 52 U.S.L.W. 4594 (1984). This Court, citing Broadrick, said:

> " The concept of "substantial overbreadth" is not readily reduced to an exact definition. It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. On the contrary, the requirement of substantial overbreadth stems from the underlying justification for the overbreadth exception itslef--the interest in preventing an invalid statute from inhibiting the speech of third parties who are not before the Court." Id. at _____, 42 U.S.L.W. at 4597-4598.

The Court of Appeals' opinion here, in its intepretation of the word "lust" as non-prurient, simplistically theorized an impermissible application of the Washington statute. Moreover, the Court of Appeals did not address the "substantial overbreadth" question. It erroneously believed that this Court's decision in Broadrick "implies that a finding of substantial overbreadth is necessary only when the challenged statute regulates conduct and not speech", citing Turchick v. United States, 561 F.2d 719, 722 (8th Cir. 1977). It went on and agreed with Turchick that "a challenge to a statute regulating pure speech would succeed on a lesser showing of facial overbreadth". Eikenberry v. J-R Distributors, Inc., 725 F.2d 482, 487 (1984).

The above-quoted language ignores totally this Court's decision in New

York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348 (1982):

> " Broadrick was a regulation involving restrictions on political campaign activity, an area not considered "pure speech," and thus it was unnecessary to consider the proper overbreadth test when a law arguably reaches traditional forms of expression such as books and films. As we intimated in Broadrick, the requirement of substantial overbreadth extended "at the very least" to cases involving conduct plus speech. This case, which poses the question squarely, convinces us that the rationale of Broadrick is sound and should be applied in the present context involving the harmful employment of children to make sexually explicit materials for distribution." Id. at 771.

Since the Ferber case implicated not only conduct but speech as well, the implied dichotomy in the application of the substantial overbreadth test observed by the Turchick court has been eliminated. Therefore, at the very least, the Court of Appeals'

failure to recognize the holding in Ferber should result in the remand of this decision to the Court of Appeals for it to properly apply the "substantial overbreadth" test. Application of this test, as mandated by Ferber and the recent decision in City Council v. Los Angeles, should result in the reconsideration and reversal of its decision. Furthermore, assuming the correctness of the Court of Appeals' belief that the word "lust" is non-prurient and is therefore constitutionally protected, it is incumbent upon the Court of Appeals to determine how often, if ever, the Washington statute would be used to chill this protected speech.[2] Amici submit that such an

---

2. Broadrick requires "that the overbreadth of a statute be not only real, but substantial as well." Broadrick at 7701 (emphasis supplied).

occurrence is most improbable. To begin with, the definition of "prurient interest" alone would not result in a nuisance abatement. The Washington moral nuisance abatement statute comes into operation only when a defendant has knowldge of the nuisance which requires the presence or existence of patently offensive sexual or violent conduct in the lewd matter. The "lewd matter" definition further requires the appeal to the prurient interest test and a number of patently offensive representations or descriptions of sexual or violent acts and which, where considered as a whole and in the context in which it is used, lacks serious literary, artistic, political, or scientific value.

Therefore, assuming the correctness of the Court of Appeals' definition of the word "lust", the statute would be

unconstitutional only when applied to a matter which depicts sexual conduct which is patently offensive without serious literary, artistic, political or scientific value and which excites only the non-prurient "lust". This examination of the Washington statute as a whole would necessarily lead one to the conclusion that impermissible applications of the statute may never occur, or that it may amount to no more than a miniscule fraction of the situations within the statute's reach. This case, therefore, is no different from the Ferber case in which this Court opined, "Nor will we assume that the New York courts will widen the possibility invalid reach of the statute by giving an expansive construction to the proscription on "lewd exhibition[s] of the genitals". Ferber, 458 U.S. at 772. The proper resolution, therefore is:

"Whatever overbreadth exists should be cured through case-by-case analysis of the fact situations to which its sanctions assertedly may not be applied [citing Broadrick]." Ferber, 458 U.S. at 773-774.

CONCLUSION

In this case, the Court of Appeals did not afford the Washington courts an opportunity to apply the law case by case. Instead, the entire statute was struck down on the basis of its interpretation of the meaning of one word--"lust". Such a meat-axe cleaver approach is disharmonious to federal/state relations, incompatible with notions of federalism, and inconsistent with established case law laid down by this Court. Amici states believe that this decision must be reversed. Alternatively, since the Court of Appeals was unaware of Ferber and City Council of Los Angeles, this Court should sum-

marily remand this case to the Court of Appeals for it to consider the "substantial overbreadth" question.

Respectfully submitted,

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No. 84-28 and 84-143
Consolidated

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1984

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DONALD C. BROCKETT,

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v.

SPOKANE ARCADES, INC., et al.,

Appellees.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR APPELLANTS EIKENBERRY, et al.
No. 84-143

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QUESTIONS PRESENTED

1. Does the Fourteenth Amendment to the Federal Constitution prohibit a state legislature from defining language in an obscenity statute by Supreme Court case law rather than the A.L.I. Model Penal Code definition?

a. Did the *Roth v. United States*, 354 U.S. 476 (1957) *definition of "prurient" permit the use of the word "lust"*?

b. Did *Miller v. California*, 413 U.S. 15 (1973) and its progeny overrule *Roth* in establishing the first leg of the tripartite test of obscenity?

2. Should a federal court invalidate a state obscenity statute on the basis of facial overbreadth when state court decisions have held that a limiting construction must be placed on a state obscenity statute?

a. Should a federal court leave to state court the construction of a newly-enacted state obscenity statute when the State Supreme Court has by case law declared the *Roth-Miller* test to be the law of construction in state obscenity cases?

b. Should a federal court leave to state court a narrowing construction of terms in an obscenity statute when the State Supreme Court has adopted the same construction used by the federal courts in construing federal obscenity statutes involving similar terms?

PARTIES

Appellants: KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington, JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington, JEFFREY C. SULLIVAN, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington, FRED ANDREWS, in his official capacity as City Attorney for the City of Yakima, Washington, NORM MALENG, Prosecuting Attorney of King County in his representative capacity only.

Appellees: J-R DISTRIBUTORS, INC.; AZURE ENTERTAINMENT CORPORATION OF WASHINGTON; JACK R. BURNS, in his representative capacity as EXECUTOR OF THE ESTATE OF SELOM F. BURNS; PLAYTIME THEATRES, INC., a Washington Corporation; KUKIO BAY PROPERTIES, INC., a Washington Corporation; SPOKANE ARCADES, INC., a Washington Corporation; THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON; MADRONA PUBLISHERS, INC.; SUPERIOR PUBLISHING COMPANY; WASHINGTON LIBRARY ASSOCIATION; MOTION PICTURES EXHIBITORS OF WASHINGTON, ALASKA, AND NORTHERN IDAHO; WASHINGTON STATE COUNCIL OF TEACHERS OF ENGLISH; WASHINGTON LIBRARY MEDIA ASSOCIATION; and THE COMMUNITY COLLEGE LIBRARIAN AND MEDIA SPECIALISTS ASSOCIATION OF WASHINGTON.

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No. 84-28 and 84-143
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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 725 F.2d 482 (9th Cir. 1984), reproduced as Appendix A in appellants Eikenberry, et al. Jurisdictional Statement. JS A-1.

The opinion of the United States District Court, Eastern District of Washington, is reported at 544 F.Supp. 1034 (E.D. Wash. 1982), and is reproduced as Appendix B

lants Eikenberry, et al., Jurisdictional Statement. JS B-1.

The Judgment was entered July 26, 1982 in the United States District Court for the Eastern District of Washington. JA 68.

JURISDICTION

Appeal was taken from a judgment of the Court of Appeals for the Ninth Circuit which invalidated, *in toto*, a Washington State anti-obscenity statute. The Court of Appeals, in a 2-1 decision, reversed the District Court for the Eastern District of Washington which had held the Washington statute constitutional.

Jurisdiction of the district court was conferred by 28 U.S.C. § 1331, and jurisdiction of the Court of Appeals was exercised under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3).

The Court of Appeals entered its judgment on February 6, 1984. JS C-1. The order denying rehearing was entered April 6, 1984. JS D-1. A notice of appeal was filed by appellant Eikenberry on June 21, 1984 and an amended notice of appeal was filed on June 25, 1984. JS E-1, F-1. Notice of appeal was filed by appellant Sloane on July 2, 1984; by appellant Maleng on July 2, 1984; and by appellants Sullivan and Andrews on July 9, 1984. JA 69-75.

Jurisdiction is conferred upon this court by 28 U.S.C. § 1254(2).

Based on the jurisdictional statement of appellants Eikenberry, et al., the appeal was docketed in this court on July 3, 1984 as No. 84-143. On October 1, 1984 this court noted probable jurisdiction.

Constitutional and Statutory Provisions Involved

First Amendment of the United States Constitution.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment, § 1, of the United States Constitution.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Wash. Sess. Laws 1984, chapter 184, 47th Legislature, House Bill 626, reproduced in JS G-1.

STATEMENT OF THE CASE

A. History of the Case

In 1977 voters of the State of Washington adopted as an initiative a moral nuisance law that established procedures for the issuance of temporary and permanent injunctions against maintenance of a moral nuisance. Wash. Rev. Code §§ 7.48.050-100. In a decision affirmed by this Court, the Ninth Circuit found that the initiative constituted an unconstitutional prior restraint. *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135, 137-139 (9th Cir. 1980), *aff'd*, 454 U.S. 1022 (1981).

Thereafter, the 1982 Washington State legislature overwhelmingly enacted into law the instant statute.[1] This statute established a dual system of civil and criminal penalties to be assessed against those who maintain a moral nuisance as defined. Wash. Sess. Laws 1982, ch. 184, 47th Legis., HB 626; JS G-1.

The measure was signed into law by the Governor on April 1, 1982. Four days later appellee J-R Distributors, Inc. filed this suit facially challenging the constitutionality

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[1] In a memorandum decision granting the preliminary injunction sought by appellees, the District Court observed as follows: "It is true that the people of Washington, both as an electorate and through their representatives, overwhelmingly favor a tougher approach to controlling pornography." JA 37.

of the law in the United States District Court for the Eastern District of Washington. JA 29. Six additional appellees filed separate suits in the same court; all seven cases were consolidated by the District Court. JA 65. Thirteen days after the Governor signed the bill, and prior to any actions for enforcement, the District Court issued a preliminary injunction barring enforcement by appellants who are the public officials authorized to enforce the statute.

No trial was held and the case was submitted to the District Court on Appellees' motions for a declaratory judgment—in effect motions for judgment on the pleadings.[2] In a lengthy memorandum decision, the District Court held the statute to be constitutional, and denied the appellees any relief. *Spokane Arcades, Inc. v. Eikenberry*, 544 F.Supp. 1034 (E.D. Wash. 1982). JS B-1 through B-32. In a 2-1 decision, the Court of Appeals reversed, holding the statute invalid *in toto*.

B. Washington's Anti-Obscenity Statute

The Washington statute utilizes both criminal and civil sanctions. The criminal penalties are established in Sec. 8, which provides in pertinent part:

> "A person who, for profit-making purposes and with knowledge, sells, exhibits, displays, or produces any *lewd matter* as defined in section 1 of this act is guilty of promoting pornography. Promoting pornography is a class C felony * * *" (Emphasis added.)

Section 1 provides the critical definitions for the whole statute, the most important of which, for purposes of this case, are found in subsections (2) and (8).

Subsection (2) defines "lewd matter" as follows:

> "Lewd matter" is synonymous with "obscene matter" and means any matter:
>
> (a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

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[2]Thus, the references to a "trial" in the opinion of the majority in the Court of Appeals are erroneous. JS A-6, A-7.

(b) Which explicitly depicts or describes patently offensive representations or descriptions of:

(i) Ultimate sexual acts, normal or perverted, actual or simulated; or

(ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or

(iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

(c) Which, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value.

Subsection (8) defines "prurient," a term used in the above quoted definition of "lewd matter," as follows: " 'Prurient' means that which incites lasciviousness or lust." The terms "lasciviousness" and "lust" are not statutorily defined.

The civil sanctions, which are triggered by the maintenance of a "moral nuisance" (Sec. 4) utilize the same definitional structure as the criminal. (See especially Sec. 2, declaring what constitutes a moral nuisance.)

The law includes a severability provision. Wash. Sess. Laws 1982, ch. 184, 47th Legis., HB 626; JS G-1.

C. **The Court of Appeals Decision**

In its 2-1 decision, the Court of Appeals found the Washington statute unconstitutionally overbroad on its face, and invalidated it *in toto*. The court began by considering the scope of the overbreadth doctrine. It acknowledged that:

> "In the case of an ordinary facial challenge to the overbreadth of a law, 'a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail.' *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 * * * (1982)." *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d at 487; JS A-10, A-11.

The court, however, went on to read *Broadrick v.*

Oklahoma, 413 U.S. 601 (1973) as creating an exception to this general rule, i.e., as eliminating the need for *substantial* overbreadth when the challenged statute regulates speech rather than conduct. *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d at 487; JS A-11.

The court next considered whether Washington state courts should first have an opportunity to construe the statute's provisions, and concluded that they should not. *Id.* at 487-488; JS A-11 through A-14. The court then took up and determined the most important question, whether the use of the statutorily undefined term, "lust," rendered the statute unconstitutional under *Roth v. United States*, 354 U.S. 476 (1957) and *Miller v. California*, 413 U.S. 13 (1973), saying:

> "Plaintiffs contend that the inclusion of 'lust' in the definition of 'prurient' impermissibly expands the boundaries of the *Miller* guidelines and renders House Bill 626 unconstitutional. We agree." *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d at 490; JS A-16, A-17.

In so concluding, the court looked exclusively at the first prong of the *Miller* conjunctive tripartite test set forth in the statute.[3] It first noted that the Washington anti-obscenity law tracked the "prurient interest" requirement almost exactly. But then, reviewing the *Roth* decision, and specifically footnote 20 in which a number of definitions of prurient were cited—including definitions using the term "lustful thoughts"—the court went awry. Because footnote 20 "concluded" with the A.L.I. Model Penal Code definition, which did not use the word "lust" or "lustful thoughts," the Court held the Washington statute unconstitutional. *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d at 490; JS A-18.

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[3]The District Court, in contrast, found that the plaintiffs challenge to the definition of "prurient" subjected the court to "semantical nit picking" which was avoided when one looked at the definition of obscenity as a function of the conjunctive tripartite test rather than the single statutory section defining "prurient." The District Court held the law was constitutional. *Spokane Arcades, Inc. v. Eikenberry*, 544 F.Supp. 1084 (E.D. Wash. 1982); JS B-1.

In addition, in so ruling the Court of Appeals took an unprecedented approach to obscenity jurisprudence—including what it characterized as the changed meaning of words brought about through contemporary usage. Specifically, the court found that the connotations associated with the term "lust" in 1957 were not necessarily applicable today. To support this observation, the court referenced a dictionary definition which no longer included "lust" in defining "prurient" and a Playboy magazine interview with then presidential candidate Jimmy Carter, who indicated that he had "looked on a lot of women with lust." *Id.*, JS A-18. Thirdly, the court cited the *Miller* case as having replaced the definitions in *Roth* with the A.L.I. Model Penal Code definition.

The Court of Appeals thus concluded that (1) lust is a healthy, wholesome, human reaction and (2) the only acceptable definition of prurient interest is "a shameful or morbid interest in nudity, sex or excretion." *Id.* at 491; JS A-19. At no time did the court address the other criteria comprising the first prong. Nor did it address the first prong as it related to the other two prongs of the *Miller* test.

Finally, the Court of Appeals decided that the Washington statute was not susceptible to an interpretation avoiding the constitutional challenge. *Id.* at 492-493; JS A-21. In doing so, the court did not cite or distinguish a previous State Supreme Court decision, authoritatively construing a predecessor anti-obscenity statute consistent with the *Roth-Miller* test. *State v. J-R Distributors, Inc.*, 82 Wn.2d 584, 512 P.2d 1049 (1973).

The dissent in the Court of Appeals, on the other hand, read as a whole *Roth's* footnote 20 which included "lustful thoughts" in defining prurient. The dissent then stated that the definition was unchanged in *Miller* and it concluded that this Court had never held the Model Penal Code was the only acceptable definition of "prurient." The dissent also rejected the changing meaning of words approach adopted by the majority. It concluded by citing *Broadrick* for the proposition that the statute was also

subject to a limiting construction in light of *Miller* and said that the court should refuse to decide the constitutional challenge until a case arose applying it. *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d at 498; JS A-32 - A-40.

SUMMARY OF ARGUMENT

In challenging Washington's anti-obscenity statute, the appellees did not make any effort in the District Court or the Court of Appeals to show that they were engaged in forms of expression protected by the First Amendment. Rather, they based their challenge upon what is commonly called the "overbreadth" doctrine. That is, they invoked the First Amendment rights of purely hypothetical parties, not before the court, whose protected expression might be prohibited by the statute.

The Court of Appeals thus awarded the appellees, whose constitutional rights are not violated, "* * * a prize for bringing to judicial attention a statute's potential unconstitutional applications to third parties." L. Tribe, *American Constitutional Law* 720 (1978). It is a prize which the appellees do not deserve to keep.

The third parties conjured up by the Court of Appeals, together with the potential applications of the Washington statute relied on by the court, simply do not exist. Indeed, the imaginings which provide the basis for the court's decision rest upon a complete misreading and misapplication of the statute, combined with a no less serious misreading and misapplication of this Court's controlling decisions in *Roth* and *Miller*.

Incorporating *Miller*, the Washington anti-obscenity statute adopted a three-prong definition of "obscene matter" and its statutory equivalent, "lewd matter." That is, obscene or lewd matter must meet and fall within all of the three prongs, not just one.[4]

The Court of Appeals, however, focused only on the

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[4]This Court has previously observed that the *Miller* test for obscenity was legislatively made a part of this Washington anti-obscenity statute. *New York v. Ferber*, 458 U.S. 747, 755 n. 7 (1982).

first prong, referring to matter "which the average person, applying contemporary standards, would find, when considered as a whole, appeals to the prurient interest * * *", and which, in turn, defines "prurient" as "that which incites lasciviousness or lust." From this definition of "prurient" the court reasoned that the statute would ban any material which merely arouses normal sexual instincts and desires, such as material purveyed by "our leading couturiers, perfumers and manufacturers of soft drinks, soap suds and automobiles * * * as well as mainstream stage, movie and television producers, directors, and performers." *J-R Distributors, Inc. v. Eikenberry,* 725 F.2d at 492; JS A-20, A-21.

Even if, perchance, it is picked up by the first prong of the definition, however, such material as the Court of Appeals thus described clearly, and quite simply, would not also be impaled by the second and third prongs,—so as to constitute "obscene" or "lewd" matter. The second prong, for example, requires that the material, in order to be obscene or lewd matter, must also:

> "* * * depict[s] or describe[s] patently offensive representations or descriptions of:
>
> (i) Ultimate sexual acts, normal or perverted, actual or simulated; or
>
> (ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area;
>
> (iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and * * *"
>
> Wash. Sess. Laws 1982, ch. 184, 47th Legis., H.B. 626 § 1(2)(b); JS G-1.

This is hardly the stuff of our normal magazine, movie, and television fare, about which the circuit court was so concerned; i.e., it is more than "expressions that may merely stimulate sexual longing or desire." *J-R Distributors, Inc. v. Eikenberry,* 725 F.2d at 491.

From its misreading of the statute, the Court of Appeals concluded that "* * * to permit expression that merely excites 'lust' to be regulated by the state would

destroy the boundaries between protected and unprotected speech." *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d at 491, JS A-19. The Washington statute, however, does not purport to regulate such expression, even under the court's broad notion of "lust" as that which merely excites normal sexual feelings. The inclusion of the second and third prong of the conjunctive tripartite test makes this absolutely clear.

The Court of Appeals also concluded that the term "lust" in the definition of prurient violates the requirements of *Miller* and perhaps of *Roth* as well. This is not so. "Lustful thoughts" and "lustful desires" were terms used in the definitions of obscenity which this Court found constitutional in *Roth* and its companion case, *Alberts*. Moreover, *Miller* did not reject the previously approved use of these terms. In formulating the now familiar three-prong test, *Miller* simply spelled out the other elements which must also be present in any constitutionally acceptable definition of obscenity—elements which the Washington definition carefully includes.

Moreover, to the extent that there nevertheless remains any legitimate doubt as to whether the statute might be construed to affect constitutionally protected expression, any such doubt should be resolved by the State Supreme Court, not the Federal Court of Appeals. Nor is there any question as to how the State Supreme Court would resolve that doubt; its prior decision in this field demonstrates that it would construe the statute to cover no more than is constitutionally permissible under *Miller*. *State v. J-R Distributors*, 82 Wn.2d 584, 512 P.2d 1049 (1973).

In bringing their injunctive action in Federal District Court four days after the statute became law, the appellees, of course, set out to prevent the state courts from having any opportunity to construe the statute. The Court of Appeals additionally erred in blessing their efforts in that regard.

Compounding its errors, the Court of Appeals further adopted an overly expansive view of the overbreadth doc-

trine, ignoring this Court's restrictions upon the application of that doctrine. In the hands of the Court of Appeals, the overbreadth doctrine has become a semantic mine field, through which a State must make its way if it wishes to control obscenity. In the hands of this Court, however, that doctrine is no such thing. Rather, the overbreadth doctrine is "strong medicine," to be used "only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

Finally, the Court of Appeals erroneously read *Broadrick* as cutting back on the scope of the overbreadth doctrine only when conduct, not speech, is involved. That this was error is shown by *New York v. Ferber*, 458 U.S. 747 (1982). The recently adopted restrictions on the use of that doctrine apply to statutes affecting speech as well, and obscenity in particular.

ARGUMENT

I. THE WASHINGTON MORAL NUISANCE LAW INCORPORATES THE *MILLER* THREE PRONG OBSCENITY TEST AND THE STATUTE'S DEFINITION OF "PRURIENT" IS CONSISTENT WITH *ROTH* AND *MILLER*.

The Court of Appeals declared the Washington Moral Nuisance law unconstitutional because it defined prurient as "that which incites lasciviousness or lust." Wash. Sess. Laws 1982, ch. 184, 47th Legis., HB 626; § 1(8). The decision "recognized the changing meanings" of the word "lust" and held that this Court had recognized only one acceptable definition of the term prurient; namely, "a shameful or morbid interest in nudity, sex or excretion." *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 490-491 (9th Cir. 1984); JS A-18, 19. That decision, however, conflicts with the judicial meaning ascribed to "prurient" by *Roth* and *Miller*. Further, it wholly disregards the other requirements for a finding of obscenity set forth in the statute, particularly the "patently offensive" requirement. The Washington statute incorporates the three-prong test for obscenity established by *Miller*, 413 U.S. at 24.

Obscene material is not entitled to First Amendment protection. *Miller*, 413 U.S. at 23; *Roth*, 354 U.S. at 485. However, defining that which is obscene has been a long

and arduous undertaking. In 1973, this Court settled on a conjunctive tripartite test.[5] *Miller*, 413 U.S. at 24. In *Miller* and its progeny, this Court did not tell the states what they had to do. Rather, it defined the "area" in which state legislatures and courts could "chart their own course in dealing with obscene material." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 53-54 (1973). Moreover, this Court in *Miller* invited authoritative constructions by state courts to bring their laws within the defined area. *Miller*, 413 U.S. at 25. Nonetheless, no such opportunity was afforded the state courts in this case; the statute was signed into law April 1, 1982 and challenged in *federal* court four days later. A preliminary injunction was issued a week later, prior to any actions being filed in state court by those empowered to bring either a civil or a criminal action.

This Court undertook to define obscenity in 1957. *Roth v. United States*, 354 U.S. 476 (1957). That definition has served as the foundation of the Court's subsequent decisions addressing obscenity. *See* F. Schauer, *The Law of Obscenity* 36 (1976). The defendant, Roth, had been convicted for mailing obscene books, periodicals, photographs and advertisements of the materials in violation of a federal statute, 18 U.S.C. § 1461. At trial, Roth contended that the statute was an unconstitutional restriction on free speech.

At about the same time David Alberts was convicted under a California state law prohibiting the sale of obscene or indecent material. He challenged the constitutionality of the state statute under which he was convicted. The two cases were consolidated when this Court granted certiorari.

In *Roth*, the jury had been instructed as follows:

> "The words 'obscene, lewd and lascivious' as used in the law, signify that form of immorality which has

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[5](a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct, specifically defined by the applicable state law; *and* (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." (Citation omitted.)

relation to sexual impurity and has a tendency to *excite lustful thoughts.*" *Roth,* 354 U.S. at 486. (Emphasis added.)

In *Alberts,* the trial judge used the test set forth in a California state court decision; namely, "whether the material has 'a substantial tendency to deprave or corrupt its readers by inciting or *arousing lustful desires.*' " *Roth,* 354 U.S. at 486. (Emphasis added.)[6]

This court, in affirming both convictions, concluded that both trial courts "sufficiently followed the proper standard. Both courts used the proper definition of obscenity." *Roth,* 354 U.S. at 489. In its decision, this Court also noted that sex and obscenity are not synonymous. Obscenity deals with sex in a manner appealing to prurient interest. *Roth,* 354 U.S. at 487. In a footnote, the Court then defined the critical term in its definition, "prurient," as follows:

> 20. I.e., *material having a tendency to excite lustful thoughts.* Webster's New International Dictionary (Unabridged, 2d ed, 1949) defines *prurient,* in pertinent part, as follows:
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> "* * * Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd. * * *"
>
> *Pruriency* is defined, in pertinent part, as follows:
>
> "* * * Quality of being prurient; lascivious desire or thought * * *"
>
> See also, *Mutual Film Corp. v. Industrial Comm.,* 236 US 230, 242, where this Court said as to motion pictures: "* * * They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a *prurient interest may be excited and appealed to* * * *" (Emphasis added.)
>
> We perceive no significant difference between the meaning of obscenity developed in the case law

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[6] *People v. Wepplo,* 78 Cal.App.2d Supp. 959, 961, 178 P.2d 853 (1947). In that case, the court stated: "A book is obscene 'if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires.' "

and the definition of the A. L. I., Model Penal Code, § 207.10(2) (Tent Draft No. 6, 1957), *viz.*:

"* * * A thing is obscene if, considered as a whole its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. * * *" *Roth*, 354 U.S. at 487, n. 20. (Emphasis added.)

Arguably, this Court thereby defined prurient as "material having a tendency to excite lustful thoughts." Even more persuasive, however, is the conclusion that any or all of the definitions contained in footnote 20 are available to a legislature in defining prurient. F. Schauer, *supra*, at 37. Yet the Court of Appeals in the instant case struck down the Washington statute. Why? Because, said the court, since the *Roth* footnote "*concluded*" (i.e., ended) with the A. L. I. Model Penal Code definition, that is the only acceptable definition. *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d at 490-491; JS A-17.[7]

If this Court had truly viewed the Model Penal Code definition as the only acceptable definition, however, the convictions of both Roth and Alberts should have been reversed based on the trial court instructions.[8] But instead, this Court stated various definitions, equally acceptable in defining prurient. *Roth*, 354 U.S. at 500 (Harlan, J., concurring in No. 61 (*Alberts*), and dissenting in No. 582 (*Roth*)).

The "prurient interest" requirement serves an essential purpose in the first prong of the obscenity test: it is intended to distinguish physical sexual stimulus from in-

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[7]The dissent in the court below was in total *disagreement* with the majority on this point. "The better interpretation is to read the footnote as a whole. * * * the footnote catalogues different ways to describe the same concept. * * * The Supreme Court has never held that the Model Penal Code provides the only acceptable definition." *J-R Distributors v. Eikenberry*, 725 F.2d at 499; JS A-34, 35.

[8]The dissent in *Roth* paid particular attention to the jury instructions in both Roth and Alberts and acknowledged that the majority had accepted the instructions defining obscenity. *Roth*, 354 U.S. at 508-509. (Douglas, J., dissenting with Black, J.).

tellectual stimulus. Only those materials which are sexually stimulating are to be considered within the scope of obscenity laws. The Washington legislature recognized and furthered that purpose by defining prurient as "that which *incites* lasciviousness or lust." Wash. Sess. Laws 1982, ch. 184, 47th Legis., HB 626; § 1(8); JS G-2. "Prurient" thus means that which incites sexual stimulation. The statute should be read as the Washington legislature intended it to be read, not as a grammarian might read it in a vacuum.

Furthermore, the "prurient" requirement is only one aspect of the test articulated in *Roth*: "whether to the *average person*, applying *contemporary community standards*, the dominant theme of the material taken *as a whole* appeals to the *prurient interest*." *Roth*, 354 U.S. at 489 (emphasis added); *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972).[9] Isolated passages from a work are insufficient to come within the ambit of the "as a whole" requirement. Thus, if the setting is literary or political and the prurient portion(s) are an integral *and relevant* part, then the work taken "as a whole" cannot be deemed legally obscene.

The "average person" requirement in *Roth* was intended to exclude what might be considered the vulnerable, susceptible, or immune. Thus, the trier of fact must determine whether the material appeals to the hypothetical average person, not the trier personally. In addition, this average person must apply "contemporary community standards" in assessing the material. Again, the trier of fact must apply an external standard, not the trier's personal views or those of a sub-part of the community. This requirement also applies the standards of the *contemporary* community, not those of another state or country nor those of years ago or into the future.

The Court of Appeals, however, improperly relied on changing dictionary definitions as a basis to declare the Washington statute invalid:

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[9]This test was made the first of the three-prong test set forth in *Miller*. The Court of Appeals here concluded that "the Washington anti-obscenity law tracks the *Miller* prurient interest requirement almost exactly." *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d at 490.

> The connotations that accompanied the word "lust" in 1957, when *Roth* was decided, are not necessarily the same ones that attach to the word today. For example, the most recent edition of Webster's New International Dictionary no longer includes the word "lust" in its definition of "prurient." *J-R Distributors v. Eikenberry*, 725 F.2d at 490. (Citation omitted.)

The court failed to note, however that the dictionary still defines prurient as lasciviousness and that lascivious is defined by the same dictionary as: "1: inclined to lechery: lewd, *lustful* * * * 2: tendency to arouse sexual desire * * * *" Webster's New International Dictionary (Unabridged, 3d ed., 1976). (Emphasis added.)[10] Thus, the definition becomes circular: that which is prurient is obscene; prurient is that which incites lasciviousness; lasciviousness is that which is lustful.

More importantly, the court's reliance on a dictionary definition is simply misplaced. In the area here involved, terms defining obscenity have taken on a judicial meaning. *Miller*, 413 U.S. at 18-19, n. 2. Dictionary definitions are not the operative definitions because, in that area (obscenity), legal terms are judicially defined terms. It is more important to look to the purpose behind the requirement, the context in which it is used, and the understanding of the trier of fact.

The Court of Appeals cited no authority for its reliance, in a constitutional challenge to an obscenity law, on a standard of changing dictionary definitions. In *Roth*, however, this Court said:

> "Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '* * * [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the

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[10]The Court of Appeals apparently found no problem with use of the word "lasciviousness" under its changing meaning approach. However, the dictionary upon which the court relied leads one to conclude that "lust" and "lascivious" are synonymous.

> proscribed conduct when measured by common understanding and practices. * * *' *Roth*, 354 U.S. at 491 (citing *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947)).

In 1962, before *Miller* the "patently offensive" standard for defining obscenity emerged in a case in which the Post Office Department, after an administrative hearing, had declared three homosexual magazines to be nonmailable matters. The publishers appealed and this Court reversed the ban. *Manual Enterprises v. Day*, 370 U.S. 478 (1962). The Court held that the magazines were not so offensive as to affront community standards of decency, "a quality that we shall hereafter refer to as 'patent offensiveness' or 'indecency'." *Id.* at 482. Thus, obscenity statutes were to reach only indecent material which, under *Roth*, taken as a whole appealed to prurient interest. The Court also held that the words "obscene, lewd, lascivious, indecent, filthy or vile" in the federal statute connoted something portrayed in a manner so offensive that it was unacceptable under current community standards. *Id.* Thus, the *Roth* definition, in particular the "prurient interest" requirement, must be read as modified by the "patently offensive" requirement set out in *Manual Enterprises*.

The Court of Appeals in the instant case also disregarded in total this "patently offensive" requirement and the conjunctive nature of the *Roth* and *Manual Enterprises* definitions. This is best illustrated by the court's reference to third parties allegedly brought under the scope of the Washington statute:

> "In fact, if the arousal of good, old-fashioned, healthy lust 'is equated with an appeal to 'prurient interest,' it might be necessary to hale into court our leading couturiers, perfumers, and manufacturers of soft drinks, soap suds and automobiles' as well as mainstream stage, movie and television producers, directors and performers." *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d at 492.

This observation by the Court of Appeals borders on the frivolous when one looks to the purpose of the "pruri-

ent interest" requirement (i.e., sexual stimulation) and reads the requirement as modified by the "patently offensive" requirement. Thus, the material (as a whole) must also be deemed so offensive as to affront the contemporary community standards of the average person. The lower court's examples are made even more ridiculous in light of the Washington statute. For there, the legislature specifically set forth the patently offensive representations or descriptions subject to its coverage; i.e.,

> "(i) Ultimate sexual acts, normal or perverted, actual or simulated; or
>
> (ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or
>
> (iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; * * *" Wash. Sess. Laws 1982, ch. 184, 47th Legis., HB 626; § 1(2)(B); JS G-1.

Material must meet these specific criteria which, in turn, create sexual stimulation in order to come within the "patently offensive" and "prurient interest" requirements. Thus, the material with which the Court of Appeals was concerned would come under the Washington statute only if "leading couturiers or perfumers" advertisements also contain these specific representations and meet the *Roth* test. Likewise, the Court of Appeals' reference to the comments of then presidential candidate Jimmy Carter in a Playboy magazine interview is equally without merit in light of the "patently offensive" requirement as well as the specific descriptions to which the Washington statute attach.

In 1973, this Court handed down eight decisions dealing with obscenity, the most significant of which provides the current definition of obscenity:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct, specifically defined by

> the applicable state law; *and* (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." (Emphasis added.) (Citation omitted.) *Miller*, 413 U.S. at 24.

This Court thus created a conjunctive tripartite test for obscenity. Material is legally obscene only if it fits *all* three prongs. The third prong however was the only one without precedent.[11] But, again, the Court of Appeals here also failed to acknowledge or address this element. Even if a play or movie, (made an example by the court below) appeals to "prurient interest" it cannot be adjudicated legally obscene unless it also meets the "patently offensive" requirement *and* lacks serious literary, artistic, political, or scientific value.

The *Miller* Court adopted the *Manual Enterprises* "patently offensive" test and the *Roth* "prurient interest" test. With regard to the latter test, the Court there noted that the words "obscene material" had taken on a specific *judicial meaning* derived from *Roth*. *Miller*, 413 U.S. at 18, n. 2. Taken in this context, the definitions of prurient contained in footnote 20 of *Roth* remain acceptable alternatives to state legislatures in drafting obscenity statutes. The Washington legislature complied with the Supreme Court precedents and the Court of Appeals' decision is an unacceptable departure from those precedents.

II. THE COURT OF APPEALS FAILED TO ADDRESS A STATE SUPREME COURT NARROWING CONSTRUCTION AND FAILED TO COMPLY WITH THE *BROADRICK* "SUBSTANTIALITY" TEST.

The Court of Appeals invalidated *in toto* the Washington State obscenity statute based on overbreadth. *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 493 (9th Cir. 1984). Apparently, the court took the overbreadth doc-

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[11] In 1964 the Court had adopted the "utterly without redeeming social value" standard. *Jacobellis v. Ohio*, 378 U.S. 184 (1964). A threefold test was then announced in 1966 combining *Roth*, *Manual Enterprises* and *Jacobellis*. *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). However, the "utterly without redeeming social value" standard was rejected in *Miller*.

trine to mean that if a *federal, not state, court* could imagine *an impermissible* construction, the state statute should therefore be declared invalid. The Court of Appeals thus used the doctrine in a manner which foreclosed consideration of a state court narrowing construction and ignored the need for substantiality. Such an approach contradicts the caveat that overbreadth should be used "only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

The Court of Appeals erred in this case by mechanically applying the overbreadth doctrine, and ignoring the fact that this Court has significantly limited use of the doctrine in recent years. The court failed to address the specific criteria as to when the overbreadth doctrine is to be invoked and further failed to consider state court precedents setting forth the construction to be accorded a state anti-obscenity statute.

Within the context of the First Amendment, the overbreadth doctrine operates as an exception to two rules usually applied in litigation involving the constitutionality of statutes.[12] The first of those rules is that a litigant normally claims a statute is unconstitutional *as applied* to him or her. If the litigant prevails, the court may narrow the scope of the statute and invalidate what would then be an improper application to the particular situation. Underlying this approach is the common sense assumption that the legislature intended the statute to be valid; hence, it did not intend the statute to authorize what would be invalid applications. Also, as an adjunct of this rule, the person challenging the law is not generally permitted to raise the rights of third parties. That principle is based on traditional notions of comity as well as the fundamental axiom that courts should decide only actual controversies. *New York v. Ferber*, 458 U.S. 747 (1982). The second rule normally applied is to approach a statute with a presumption of constitutionality. And if construction of the statute is involved it should be construed, where possible, in a manner which preserves constitutionality. Moreover, that con-

[12]See, *City Council of Los Angeles v. Taxpayers for Vincent*, 104 S.Ct. 2118 (1984).

struction should appropriately come from the state court for a state statute. *Gooding v. Wilson*, 405 U.S. 518 (1972).

Under First Amendment overbreadth analysis, however, those two rules give way to a limited extent. A review of the application of a statute is not confined to the conduct of the specific party before the court. *Thornhill v. Alabama*, 310 U.S. 88 (1940). The approach taken is premised on the assumption that the existence of an overly broad statute may have a "chilling effect" on the exercise of constitutionally protected speech by others not before the court. If there is such a hypothetical "chilling effect" on third parties, the court may hold the entire statute invalid "on its face," not "as applied." But because the overbreadth doctrine can result in the court declaring a law invalid *in toto* in a facial challenge, it is "strong medicine" which should be employed sparingly and "only as a last resort." *Broadrick*, 413 U.S. at 613.

A common problem in adjudicating the constitutionality of a statute subject to an overbreadth challenge is how far the court should seek out *possible* unconstitutional applications. The normal rules of standing negate the need to engage in hypothetical applications because with real parties in interest the court has before it a concrete factual situation. The judicial result is therefore a refinement of the law as applied to a particularized situation rather than an invalidation *in toto*, based on hypothetical possibilities. In a case like the one now before this Court, where a legislature has attempted to promote a concededly valid goal, invalidation based on facial overbreadth can pose problems of comity between legislative and judicial branches of government.

The overbreadth doctrine was invoked with considerable frequency in the sixties. Some of the popularity of the doctrine stemmed from a sense of judicial activism dealing with constitutional questions more broadly. In doing so, the courts did not deal directly with the speech or conduct of the litigant before them because the statute was invalidated based on the *possible* application to a third party not before the court. Such application was often briefly

addressed rather than fully explored. *United States v. Rabel*, 389 U.S. 258 (1967).

The overbreadth doctrine originated in a case involving review of a state court conviction for labor picketing. *Thornhill v. Alabama*, 310 U.S. 88 (1940). In the words of the Alabama statute, the defendant was convicted of "loitering or picketing" with the intent or purpose to influence, hinder, delay or interfere with a lawful business. *Thornhill*, 310 U.S. at 91-92. The Alabama court had made no effort to narrow the sweep of the statute. This Court reversed, examining the statute on its face rather than reviewing it on the facts presented. In this facial review the Court created the overbreadth doctrine, saying:

> "There is further reason for testing the [statute] on its face * * * * Where regulations of the liberty of free discussion are concerned there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression." *Thornhill*, 310 U.S. at 97-98. (Citations omitted.)

The *Thornhill* case thus seemed to suggest that a statute regulating speech which embraces permissible as well as impermissible applications is void on its face and not, instead, subject to a narrowing construction. However, in the first important case on the subject following *Thornhill*, this Court accepted a state court narrowing construction. *See Cox v. New Hampshire*, 312 U.S. 569, 576-578 (1941). Likewise, in the area of obscenity, this Court has since accepted the construction of the state court with regard to a state statute. *Ward v. Illinois*, 431 U.S. 767, 773-776 (1977).[13]

The extensive use of the overbreadth doctrine in the sixties led to concern and criticism in the seventies. This Court refined the role of the federal judiciary with reference to state courts in *Younger v. Harris*, 401 U.S. 37 (1971). That case involved a facial challenge to a California

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[13]The state court construed an obscenity statute in accordance with the requirements of *Miller v. California*, 413 U.S. 15 (1973).

criminal syndication law. The defendant had been indicted and he sued to enjoin prosecution. In reversing the lower court, this Court noted that "chilling effect," even in the area of First Amendment rights, should not, by itself, justify federal intervention prohibiting state action. *Id.* at 50-51. This Court then addressed a "more basic consideration": the function of federal courts in the overall constitutional plan:

> "The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision; * * * But this vital responsibility, broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them." *Id.* at 52.

This Court further noted that the notion of comity involved a respect for state functions—a reaffirmation of "Our Federalism." That concept was intended to recognize the need to protect constitutional rights in a manner which does not unduly interfere with legitimate activities of the states. *Id.* at 44. Concern with the overbreadth doctrine was emphasized by the Court regarding *potential* applications to parties not before it by the following factors: "relative remoteness of the controversy," "impact on the legislative process" and "above all the speculative and amorphous nature of the required line-by-line analysis of detailed statutes." *Younger*, 401 U.S. at 53.

One of the main criticisms of the doctrine has been the lack of specificity in its application. How much overbreadth renders a statute invalid *in toto*? When should the federal courts allow a state court to construe the challenged statute? How far should a court go in imagining an impermissible application of the statute to a third party not before it?

In recognition of those concerns, this Court formulated some standards for the application of the doctrine. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601 (1973). *Broadrick* involved a challenge to the Oklahoma Merit

System Act restricting political activities by classified state employees. Appellants, who had campaigned for a superior, challenged the statute on vagueness and overbreadth grounds—alleging the statute reached protected, as well as unprotected conduct. This Court, however, rejected the challenge. While the law seemed to reach some protected acts such as wearing campaign buttons or displaying bumper stickers, this Court held that those applications (though substantial in numbers) were insubstantial when compared with the law's legitimate applications. *Id.* at 609-618. In curtailment of the overbreadth doctrine, the Court said that it should not be invoked "* * * when a limiting construction *has* been or *could be* placed on the challenged statute." *Broadrick*, 413 U.S. at 613. The Court then created a further limitation on its use, namely—the requirement of substantiality:

> "To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615.

This Court has also sought to accommodate the competing interests of allowing the free exercise of First Amendment rights and avoiding unnecessary interference with state legislative acts. The two criteria enunciated for application of the facial overbreadth doctrine were stated succinctly in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975):

> "In accommodating these competing interests the Court has held that a state statute should not be deemed facially invalid *unless it is not readily subject to a narrowing construction* by the state courts, see *Dombrowski v. Pfister*, 380 U.S. 479, 497 (1965), and its deterrent effect on legitimate expression *is both real and substantial.*" See *Broadrick v. Oklahoma*, 413 U.S. 601, 612-615 (1973). (Emphasis added.)

The first criterion recognizes a valuable institutional purpose—the need to avoid wholesale invalidation by the federal judiciary in deference to state courts. It also recog-

nizes the abilities and good intentions of state legislators in drafting statutes and the need for federal courts to avoid being barraged with hasty review of state statutes. The criteria recognizes the ability of state courts to construe state statutes in a manner which avoids constitutional infirmities. *Ferber,* 458 U.S. at 768.

The second criteria, i.e., substantiality test, avoids striking down laws merely because one can conceive of a single hypothetical impermissible application of the statute. *City Council of Los Angeles v. Taxpayers for Vincent,* 104 S.Ct. 2118, 2126 (1984). The party invoking the doctrine must demonstrate a *realistic* danger that the statute will *significantly* compromise First Amendment protections. *Id.* at 2127. *See generally* Note, *The First Amendment Overbreadth Doctrine,* 83 Harv.L.Rev. 844 (1970). It is difficult to think of a statute that is completely devoid of some potential for unconstitutionality in a unique hypothetical application. Only substantially overbroad laws, however, create the "chill" which is judicially cognizable. *Id.* at 859, n. 61. In other words, a statute should *not* be struck down for overbreadth if the number of instances in which the law could conceivably be applied to protected expression pales in comparison to the number of instances of unprotected behavior which is the law's legitimate target.

It might nevertheless be argued that the substantiality test articulated in *Broadrick* applies only to a speech/conduct continuum, with a stronger showing required to invalidate a statute based on conduct rather than speech. That question was posed in a case relating to New York's child pornography law. *New York v. Ferber,* 458 U.S. 747 (1982). The *Ferber* case involved the conviction of a bookstore proprietor under a state statute for selling films depicting young boys masturbating. The Court, in logical extension of the recent developments in the area of overbreadth analysis, concluded that the substantiality test was to be applied to speech as well as conduct, saying:

> "The premise that a law should not be invalidated for overbreadth *unless it reaches a substantial number of impermissible applications* is hardly novel. On

> most occasions involving facial invalidation, the Court has stressed the embracing sweep of the statute over protected expression. * * * The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrents of protected speech can be expected to decrease with the declining reach of the regulation. This observation *appears equally applicable to the publication of books and films as it is to activities,* such as picketing or participation in election campaigns, which have previously been categorized as involving conduct plus speech. We see no appreciable difference between the position of a publisher or bookseller in doubt as to the reach of New York's child pornography law, and the situation faced by the Oklahoma state employees with respect to that State's restriction on partisan political activity. *Id.* at 771-772. (Emphasis added.)

The Court further noted, once again that "obscenity is not within the area of constitutionally protected speech." *Ferber,* 458 U.S. at 754 (quoting *Roth v. United States,* 354 U.S. 476, 485 (1957)). Further, the Court's analysis recognized that states have a legitimate interest in prohibiting the dissemination or exhibition of obscene material. The *Miller* standard was an accommodation between these state interests and the dangers of censorship. *Ferber,* 458 U.S. at 754-756. *Miller v. California,* 413 U.S. 15 (1973).[14]

In the instant case, the Washington moral nuisance statute underwent challenge four days after it was signed into law. Although the district court rejected the overbreadth doctrine it served as the basis for reversal by the Court of Appeals. The latter court disregarded the obvious

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[14]"When we follow our traditional practice of adjudicating difficult and novel constitutional questions only in concrete factual situations, the adjudications tend to be crafted with greater wisdom. Hypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors; they are qualitatively less reliable than the products of a case-by-case adjudication. * * * I agree that generally marginal speech does not warrant the extraordinary protection afforded by the overbreadth doctrine." *Ferber,* 458 U.S. at 780-781 (Stevens, J., concurring).

concerns of this Court and the curtailment of the overbreadth doctrine as above described. Indeed, it ignored the fact that in 1971 this Court reemphasized the traditional policies of comity and "Our Federalism" by allowing for protection of constitutional rights in a manner which does not unduly interfere with the legitimate activities of the states. *Younger*, 401 U.S. at 44. Similarly, it paid no heed to this Court's action in 1973, explicitly setting down guidelines for use of the doctrine in *Broadrick*. Nor did it acknowledge that the substantiality requirement was extended to the area of speech in 1982. *Ferber*, 458 U.S. 669-670. See also, *Vincent*, 104 S.Ct. 2118 (1984). Citing *Broadrick*, the Court of Appeals erred by premising its overbreadth holding on a lesser showing than substantial overbreadth. *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d at 487. Moreover, the court failed to address this Court's holding in *Ferber* that the substantiality test applies generally to speech, and specifically to obscenity. *Ferber*, 458 U.S. at 669-670.

The Court of Appeals also violated the longstanding policy of this Court that the construction of state legislation should be left to state courts.[15] *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123, 130 n. 7 (1973). Specifically, the court here construed the word "lust" to mean a "healthy, wholesome, human reaction." *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d at 490-491.[16] The Court of Appeals undertook to construe the statute in that manner rather than leaving its proper construction to the state court. Further, it did so by applying the single construction which it believed would render the statute invalid.

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[15]This approach by the Court of Appeals is evident in another context. In a recent decision, the court en banc adopted as the new law of the Ninth Circuit the rule that questions of state law are reviewable under the same independent de novo standard as are questions of federal law. *Matter of McLinn*, 739 F.2d 1395, 1397 (9th Cir. 1984). In so holding, the Ninth Circuit stands alone among the circuits in failing to give "great weight" or "substantial deference" to district court judges' expertise in local law. *Id.* at 1403-1404. The inevitable result is that the federal appellate courts, like here, will be faced with more state law issues but with little guidance. *Id.* at 1406 (Schroeder, J., dissenting).

Case law in Washington makes it clear that the Washington court would construe its obscenity statutes in such a manner which meets federal constitutional standards. *See State v. J-R Distributors, Inc.*, 82 Wn.2d 584, 512 P.2d 1049 (1973). In that case, an earlier obscenity statute was challenged as being unconstitutionally vague in its definition of "obscene." The state court first noted that the three elements of *Miller* had to *coalesce* before material could be declared obscene. *Id.* at 594, 512 P.2d at 1057. In defining obscene, the court concluded that the *Roth* definition was basic to the holding in *Miller* and thus it authoritatively construed the state statute in light of, and as limited by the *Roth-Miller* test. *Id.* at 601, 512 P.2d at 1060, n. 2. The Washington court sustained the law, saying:

> "We hold that the word 'obscene' as used in RCW 9.68.010, is not unconstitutionally vague when considered within the light of the *Roth-Miller* test. According to the *Roth-Miller* test, the scope of regulation is confined to works which depict or describe sexual conduct. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, portraying sexual conduct in a way that is patently offensive, and which taken as a whole does not have a serious literary, artistic, political, or scientific value. As thus *authoritatively construed* by this court, RCW 9.68.010 is sufficiently definite, when measured by common understanding and practice. *State v. J-R Distributors, Inc.*, 82 Wn.2d at 601-602, 512 P.2d at 1060.

In its decision, the Washington court also recognized the construction given similar terms in federal obscenity statutes by this Court in cases such as *United States v. 12 200-Ft. Reels*, 413 U.S. at 130, n. 7. On that count, this Court said:

> "We further note that, while *we must leave to state courts the construction of state legislation*, we do have a duty to *authoritatively construe* federal statutes where 'a serious doubt of constitutionality is raised' and 'a construction of the statute is fairly possible by which the question may be avoided'. If and when such a 'serious doubt' is raised as to the vague-

> ness of the words 'obscene', 'lewd', 'lascivious', 'filthy', 'indecent', or 'immoral' * * * *we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in Miller v. California,* * * * *" (Citations omitted.) *State v. J-R Distributors, Inc.*, 82 Wn.2d at 601, 602, 512 P.2d at 1060-61 (quoting *United States v. 12 200-Ft. Reels*, 413 U.S. at 130, n. 7).

The Court of Appeals in the instant case did not consider this state court construction. Had it done so, it would have recognized the error in its own construction. Further, it could have readily severed the definition of prurient from the statute altogether, leaving it undefined by statute but defined by case law. By rejecting both alternatives—allowing the state courts to construe the statute or severing the definition of prurient and applying the state court definition—the Court of Appeals committed a critical error.

Federal courts generally apply state rules of interpretation in construing the constitutionality of state laws. *Wakinekona v. Olim*, 664 F.2d 708 (9th Cir. 1981). In Washington, determination of whether invalidation of a part of a statute would render the whole of the statutory scheme a nullity depends upon judicial interpretation of the legislature's intent. *State v. Anderson*, 81 Wn.2d 234, 501 P.2d 184 (1982); *In re Hendrickson*, 12 Wn.2d 600, 123 P.2d 322 (1942). The standard observed for judicial invalidation of Washington statutes is as follows:

> An act of the legislature is not unconstitutional in its entirety because one or more of its provisions is unconstitutional unless the invalid provisions are unseverable and it cannot reasonably be believed that the legislature would have passed the one without the other, or unless the elimination of the invalid part would render the remainder of the act incapable of accomplishing the legislative purposes. *State v. Anderson*, 81 Wn.2d at 231, 501 P.2d at 185-86.

The statute in question contains a severability clause. Wash. Sess. Laws 1982, ch. 184, 47th Legis., HB 626; § 9. That clause expressly evidences intent of the legislature

that Washington's laws regulating obscenity shall endure judicial abrogation of discrete parts of the legislative scheme. The effect of enactment of a severability clause is "to minimize the possibility of a holding that the entire act is invalid." *State ex rel. Pennock v. Coe,* 42 Wn.2d 569, 585, 257 P.2d 190, 201 (1953).

It appears incontestable that the Washington legislature intended to enact and secure enforcement of laws regulating the sale and display of obscene materials. The legislative will is demonstrated by the enactment of the predecessor statutes which have endured since 1909. Wash. Rev. Code ch. 9.68.010, 020. The state legislature expressly repealed these statutes as the new statute was intended to embrace the same subject matter. If appellees are correct in asserting that Washington's legislature is guilty of definitional excess it seems abundantly clear, nonetheless, that the legislature intended to regulate the core materials which may unlawfully appeal to what the courts of Washington and federal courts would describe as a "prurient interest." Washington's statutory silence upon a definition of prurience, as a result of judicial excision of the severable definition of prurient, would not offend the Constitution of the United States. *Red Bluff Drive-In, Inc. v. Vance,* 648 F.2d 1020, 1026 (5th Cir. 1981); *cert. denied* sub nom. 455 U.S. 913 (1982); *see also Ward v. Illinois,* 431 U.S. 767 (1977).

CONCLUSION

The Washington State legislature incorporated the *Miller* three-prong obscenity test into the moral nuisance law in question. Specifically, the Washington statute defines "prurient," used in the first prong, consistent with one of the alternative definitions provided in *Roth* and adopted in *Miller.*

The Ninth Circuit Court of Appeals declared the statute unconstitutional holding the A.L.I. Model Penal Code definition of "prurient" to be the only acceptable definition. To support this conclusion, the court relied on an unprecedented "changed meaning" criterion in defining

the term "lust" based on its contemporary usage. Such a construction is in derogation of this Court's precedents and in disregard of the conjunctive tripartite obscenity test.

The Court of Appeals relied on the overbreadth doctrine to invalidate the statute *in toto*. In doing so, the court failed to employ the "substantiality" test set forth in *Broadrick* and recently re-established for speech generally and obscenity in particular through *Ferber*. Finally, the court failed to consider the severability of the "prurient" definition, leaving the term to be defined by Washington case law.

For these reasons, the decision of the Court of Appeals should be reversed.

DATED this 15th day of November, 1984.

Respectfully Submitted,

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Nos. 84-28 and 84-143

In The

Supreme Court of the United States

October Term, 1984

No. 84-28

DONALD C. BROCKETT,
Spokane County Prosecuting Attorney
Appellant,

vs.

SPOKANE ARCADES, INC., et al.,
Appellees,

No. 84-143

KENNETH EIKENBERRY,
Attorney General for the State of Washington, et al.,
Appellants,

vs.

J-R DISTRIBUTORS, INC., et al.,
Appellees,

On Appeal From The United States
Court Of Appeals For The Ninth Circuit

BRIEF OF APPELLANT BROCKETT

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QUESTIONS PRESENTED

1. May a United States Court of Appeals compel state anti-obscenity laws to define "prurient" with words that mean a shameful or morbid interest in sex, nudity or excretion, where this Court has never required state statutes to define "prurient" in a similar manner?

2. May state obscenity laws be written, under the "prurient interest" prong of the test, to regulate matter which portrays erotic sexuality in a manner designed to create some form of stimulation, or must states only regulate matter which appeals to a shameful or morbid interest in sex, nudity or excretion?

3. Does a United States Court of Appeals have the authority to construe Supreme Court cases and mandate one national definition of.

"prurient" for state obscenity laws where this Court has never mandated a national definition of "prurient" and to the contrary, has specifically allowed local community control of obscenity?

LIST OF PARTIES TO THE PROCEEDINGS

1. Kenneth Eikenberry, Attorney General for the State of Washington;

2. Donald C. Brockett, Spokane County Prosecutor, State of Washington;

3. Norm Maleng, King County Prosecutor, State of Washington;

4. Jeffrey C. Sullivan, Yakima County Prosecutor, State of Washington

5. James Sloane, Spokane City Attorney, State of Washington;

6. Fred Andrews, Yakima City Attorney, State of Washington.

The above-enumerated parties occupied the status of Defendants before the United States District Court, Appellees in the United States Court of Appeals for the Ninth Circuit, and are presently Appellants in the action before this court. The below-enumerated parties were Plaintiffs before the United States District Court for the Eastern District of Washington, Appellants in the United States Court of Appeals for the Ninth Circuit, and occupy the status of Appellees before this court.

1. J-R Distributors, Inc.,;

2. Azure Entertainment Corporation of Washington;

3. Jack R. Burns, in his representative capacity as Executor of the Estate of Selom F. Burns;

4. Playtime Theaters, Inc.;

5. Kukio Bay Properties, Inc.;

6. Spokane Arcades, Inc.;

7. American Civil Liberties Union of Washington;

8. Madrona Publishers, Inc.;

9. Superior Publishing Company;

10. Washington Library Association;

11. Pacific Northwest Bookseller's Association;

12. Motion Picture Exhibitors of Washington, Alaska, and Northern Idaho;

13. Washington State Council of Teachers of English;

14. Washington Library and Media Association;

15. The Community College Library and Media Specialists Association of Washington.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 725 F.2d 482 (9th Cir. 1984). The opinion of the United States District Court for the Eastern District of Washington, which the Ninth Circuit decision reversed, is reported at 544 F. Supp. 1034 (E.D. Wash. 1982).

JURISDICTION

1. This is an appeal from the judgment of the Court of Appeals for the Ninth Circuit invalidating as repugnant to the federal constitution a state statute regulating obscenity. The statutory basis of this appeal is 28 U.S.C. § 1254(2).

2. The judgment of the United States

Court of Appeals for the Ninth Circuit was entered on February 6, 1984. A timely petition for re-hearing was filed, and was denied by the United States Court of Appeals for the Ninth Circuit on April 6, 1984. Notice of Appeal was filed by this appellant on June 25, 1984, with the United States Court of Appeals for the Ninth Circuit. This Court noted probable jurisdiction on October 1, 1984.

3. The statutory basis conferring jurisdiction on this court is 28 U.S.C. § 1254(2), which provides in relevant part for review by the Supreme Court of cases in the Court of Appeals "[by] appeal by a party relying on a state statute held by the Court of Appeals to be invalid as repugnant to the Constitution, treaties, or laws of the United States, . . .".

CONSTITUTIONAL PROVISIONS

AND STATUTES

1. U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. U.S. Const. amend. XIV, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

3. Wash. Rev. Code § 7.48A.010-7.48A.900 (HB 626);

4. Wash. Rev. Code § 9.68.140 (HB 626);

STATEMENT OF THE CASE

The Washington State Legislature enacted the

statutes in controversy with an effective date of April 1, 1982. On April 5, 1982, J-R Distributors, Inc., and Azure Entertainment Corporation of Washington filed separate suits in the United States District Court for the Eastern District of Washington, seeking declaratory and injunctive relief against the enforcement of the statutes. They were subsequently joined by other parties filing similar suits. The seven suits were consolidated for hearing by the District Court and have remained consolidated for review and judgment in the United States Court of Appeals for the Ninth Circuit.

The appellees, in the United States District Court, claimed that the inclusion of the word "lust" in the statute's definition of "prurient" unconstitutionally expanded the Roth-Miller tripartite test for obscenity. "Prurient" is defined in § 1(8) [RCW 7.48A.010(8)] of the

statute as "that which incites lasciviousness or lust". Appellees, in the consolidated cases maintained, on this issue, that "prurient" may only be defined under Roth-Miller as that which is characterized as a shameful or morbid interest in sex, nudity or excretion. This issue was first raised by appellees, J-R Distributors, Inc., and Azure Entertainment in their Brief in Support of Motion for Temporary Restraining Order.

Appellants argued that the meaning of "prurient" embraced the word "lust" and that this specific judicial meaning was established in Roth, and affirmed by Miller. Roth v. United States, 354 U.S. 476 (1957); Miller v. California, 413 U.S. 15 (1973). We urged that the "prurient" part of Miller's tripartite test required only that the expression, in some significant way, be erotic. The District Court concluded that the Roth decision settled on a definition of "prurient"

as that matter having a tendency to incite lustful thoughts. It felt that juries would be able, based upon their understanding of the common meaning ascribed to lust and lasciviousness, to properly apply the "prurient" prong of Miller.

On appeal, appellees urged again a circumscribed definition of "prurient" which could only entail a shameful or morbid interest in sex, nudity or excretion. It was first argued in J-R Distributors, and Azure Entertainment's Statement of Issues, p. 3. The Ninth Circuit concluded that irrespective of whether Miller equated "prurient" interest with "lust" the connotations which accompanied the word "lust" in 1957 have changed significantly. The Court said the word "lust" now has acceptable connotations and refers in common usage to a healthy and wholesome interest in sex. It ruled further that Roth actually compelled only one constitutionally

acceptable definition of "prurient" -- a shameful or morbid interest in sex, nudity or excretion.

The Court of Appeals held that by including the word "lust" in its definition of "prurient", the Washington State Legislature exceeded established boundaries of obscenity regulation by punishing something other than a shameful or morbid sex interest. The court ruled that the word "lust" cannot be used because it now connotes a healthy, wholesome and human reaction to sex, and cited a Playboy magazine interview with President Carter and Webster's New International Dictionary (Unabridged, 3d Ed. 1976), for further support of connotative change.

SUMMARY OF ARGUMENT

The purpose of this Court's obscenity test is to separate protected from unprotected

expression. Roth v. United States, 354 U.S. 476, 488 (1957). Only expression which meets all three prongs of a conjunctive, three-part test, is hard-core pornography and can be found to be obscene. Miller v. California, 413 U.S. 1, 24 (1973). No single factor of the test is fully determinative of the ultimate question of obscenity; all must coalesce in order for certain expression to be found obscene. Id. at 24-25, 30.

Each prong of the Miller test serves to separate protected from unprotected expression, but all three must be met for the expression to be denied First Amendment protection. Because sex and obscenity are not synonymous, application of the first prong assures that only "material which deals with sex in a manner appealing to prurient interest" will be subject to the remaining two prongs of the obscenity test. Roth, 354 U.S. at 487. To illustrate the purpose

of the pruriency prong, the Roth court provided a list of definitions. Id. at 487, fn. 20. All definitions serve to distinguish sexual desire or longing from descriptions or depictions of sex that embrace the exposition or advocacy of ideas. The latter category of expression exhibits characteristics that the first amendment was designed to protect, and which distinguish it from obscenity. Expression which merely stimulates sexual desire or longing, however, appeals to the prurient interest, and while not obscene at this stage of the analysis, is nevertheless subject to the remaining prongs of the Miller test.

Later decisions of this Court acknowledge that this is the function of the "prurient interest" prong. If the appeal is for "titillation, not saving intellectual content," the function of the prong is served, and the expression is subject to the full test. Splawn v. California, 431 U.S. 595, 598 (1977). The Miller decision confirmed

that the pruriency prong performs a threshold function of separating appeals to the intellect from appeals to sexual stimulation. This checking function assures that expression may be both prurient and patently offensive, but not obscene because it exhibits serious literary, artistic, scientific or social value. Miller, 413 U.S. at 30.

The Ninth Circuit erred when it concluded that expresson which stimulates sexual desire or longing can be punished, as obscene, under Washington's anti-obscenity law, HB 626. Expression which stimulates in this manner merely meets the prurient interest prong of HB 626 and the Roth-Miller test, but is still subject to the additional factors of patent offensiveness, and the value. of the work. This Court has never restricted the meaning of "prurient interest" to that which is shameful of morbid. The reference in footnote 20 of Roth to this phrase was merely to observe that it formed a subgroup of all

appeals to sexual longing or desire which are characterized as "prurient appeals".

HB 626 defines "prurient interest" in language consistent with the purpose of this part of the Miller test, viz. that which incites sexual desire or longing. The use of the word "lust" in this statutory definition is consistent with the requirements of Roth-Miller and the purpose of the concept of "prurient interest."

ARGUMENT

The initial challenge to Washington state's anti-obscenity law (hereinafter HB 626) and that which was sustained by the Ninth Circuit Court of Appeals involved the first prong of the currently accepted tripartite test of obscenity. Under Miller, an average person applying contemporary community standards must find "that the work, taken as a whole, appeals to the

prurient interest." Miller v. California, 413 U.S. 15, 24 (1973). The textual portion of HB 626 tracks this language and §1(8) defines "prurient" as that "which incites lasciviousness or lust." The Ninth Circuit concluded that this language expanded Miller's guidelines impermissibly on two grounds. First, the Ninth Circuit ruled that the only constitutionally acceptable meaning of "prurient" is a "shameful or morbid interest in sex, nudity or excretion." J. R. Distributors, Inc.v. Eikenberry, 725 F.2d 482, 490 (9th Cir. 1984). Second, it concluded that "lust" had lost its historical meaning, and now connotes little more than a "healthy, wholesome, human reaction common to millions of well-adjusted persons in our society." Id. at 490. On this basis, it ruled that Washington's anti-obscenity law defined "prurient" too broadly, thus the statute was overbroad and unconstitutional. In fact, the court's opinion observed that expression that

"may merely stimulate sexual longing or desire . . . cannot constitutionally be branded obscene." Id. at 490.

The conclusion that "prurient" may only embrace a shameful or morbid interest in sex seriously misapprehends the purpose of the "pruriency" concept, and is inconsistent both with the historical development of the concept in American jurisprudence, and with this Court's decisions. Indeed, the "pruriency" concept is but the first factor in a three part conjunctive Miller test that must coalesce before a trier of facts can conclude any expression is obscene. Miller, 413 U.S. at 24-25; see Jacobellis v. Ohio, 378 U.S. 184, 191 (1964). Its function is to separate an appeal to an intellectual interest in sex, and hence a protected one, from an appeal to a non-reasoning, non-cognitive stimulation. If the appeal is for "titillation, not for saving

intellectual content," then the pruriency factor is met, and the remaining prongs of the tripartite test must be addressed before the obscenity determination is complete. Splawn v. California, 431 U.S. 595, 598 (1977). The "pruriency factor is, therefore, value-neutral and serves to distinguish an intellectual interest in sex from a non-cognitive, intuitive physical incitement.

Any examination of the historical development of obscenity law in the United States must commence with a view that obscene expression "are not an essential part of any exposition of ideas." Roth v. United States, 354 U.S. 476, 485; see also Chaplinsky v. New Hampshire, 351 U.S. 568, 572 (1942). Its non-protected status, therefore, derives from the constitutional imperative that first amendment protection was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social

changes desired by the people." New York Times v. Sullivan, 376 U.S. 254, 269 (1964), quoting Roth v. United States, supra, 354 U.S. at 484. Obscene expressions exhibit no first amendment protection because they embody none of the interests that the first amendment was designed to protect.

This Court has long recognized that the essential function of an obscenity test is to distinguish protected from unprotected expressions, affording constitutional protection to the first category, and making the latter subject to legislative control. Roth v. United States, supra, 354 U.S. at 488. Formulation of a test with sufficient guidelines to distinguish obscenity from protected first amendment expression commenced with Roth and culminated in Miller. In fact, Miller represented the first time since the Roth decision that "a majority of this court has agreed on concrete guidelines to isolate 'hardcore'

pornography from expression protected by the First Amendment." Miller v. California, supra, 413 U.S. at 29. Each prong of the Miller test functions to scrutinize the expression to determine if it exhibits characteristics that entitle it to first amendment protection. Satisfying one or most of the three tests is not determinative of the ultimate question of obscenity -- all must coalesce before a correct constitutional assessment be made. Miller v. California, supra, 413 U.S. at 24-25.

Under the Miller test, an expression is obscene if the following three prongs are satisfied:

> (a) "Whether 'the average person, applying contemporary community standards' would find the work, taken as a whole, appeals to the prurient interest;
>
> (b) Whether the work depicts or describes, in a patently offensive way,

> sexual conduct specifically defined by the applicable state law; and
>
> (c) Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value."

Id. at 24. The "pruriency" prong was designed to create an overinclusive category of expression all of which appeal to prurient interest, and some of which may be obscene if remaining Miller tests are satisfied. The error of appellees and the Ninth Circuit decision lies in the mistaken assumption that the obscenity determination is made merely through application of the "pruriency" prong. Indeed, expression that merely stimulates sexual longing or desire, while meeting the pruriency prong, must meet both of the remaining Miller prongs, to be "hard-core" before it is denied first amendment protection. These prongs assure that only prurient expression may be adjudged obscene, but also provide a check so that not all prurient

expressions are ob. ·ene.

Only in Roth v. United States did this Court attempt to define "prurient interest," although evidence of the character of that concept is found in many pre- and post- Roth decisions. Although the Court employed various descriptive words to illustrate the concept, all share a common purpose that requires the trier of fact to determine whether the expression appeals to exposition or advocacy of ideas, or instead appeals to "titillation" or "sexual stimulation." Ginzburg v. United States, 383 U.S. 463, 470-471 (1966). If the appeal is to the non-cognitive interest, the pruriency interest category is established, and the remaining prongs in Miller are fully determinative of the ultimate question of obscenity.

The Roth opinion took measured steps to

make clear that not every description or discussion of sex could be prohibited. Because "sex and obscenity are not synonymous" only "material which deals with sex in a manner appealing to prurient interest" could be obscene, subject to the checking scrutiny of the remaining tests of Roth, and later Miller. Roth v. United States, supra, 354 U.S. at 487 [footnote omitted]. To distinguish a protected, intellectual interest in sex from one appealing to a non-cognitive or stimulative interest, the Roth court provided a long list of illustrative definitions. Id. at 484, fn.20. Each of the definitions of the footnote shared a common core purpose -- "prurient interest" means sexual stimulation, either manifested physically or intuitively, and does not pertain to an intellectual interest in sex. First Amendment protections are not accorded, thusly, to expression appealing to "titillation" that also meet the remaining of the

Roth-Miller guidelines.

Indeed, the Miller court recognized that the "pruriency" concept embodied no value judgment and merely served to move the character of the expression to the full constitutional test of obscenity. It recognized that the purpose of the pruriency prong was to separate speech from nonspeech by making essentially a judgment-neutral decision that an appeal was not to ideas, but to physical desire, longing or stimulation. That this was the function of the pruriency prong is evident in the Miller conclusion that an expression may be both prurient and patently offensive, but not obscene:

> At a minimum, a prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection.

Miller v. California, 413 U.S. at 26. The Ninth Circuit erred when it assumed that the ultimate

determination of obscenity is fully answered merely through the application of the threshold test of "prurient interest". This assumption is at odds with this Court's requirement that all three prongs must coalesce in order for expression to be adjudged obscene. Id. at 24-25.

That "prurient interest" is equated with the sexual stimulation or longing is confirmed by observing what Roth-Miller rejected in earlier tests of obscenity. English and early American jurists held that obscenity should be constitutionally defined in terms of its tendency to "deprave or corrupt." Regina v. Hicklin, [1868], L.R. 3 Q.B. 360, 371; United States v. Kennerly, 209 F. 119, 120 (S. D. N.Y. 1913). Roth replaced the ambiguous notion of "deprave or corrupt" with the concept of "prurient interest" because an application of the former to certain expressions could offend first amendment

values. Simply, because "deprave and corrupt" tendencies carried potential application to the market place of ideas, a concept was established to distinguish the intellectual interest from the sexual longing, prurient interest in sex. This Court sought to remove any potential for the trier of fact to judge the social utility of a particular intellectual interest in sex by distinguishing "prurient interest" as a physical stimulation exclusively. Thus, American jurisprudence discarded by its reasoning in the Roth decision what was previously permitted in Hicklin in English obscenity jurisprudence -- the authority of the trier of fact to judge the social utility of the idea embraced by the allegedly obscene expression. Roth v. United States, supra, 354 U.S. at 489; see also United States v. Kennerly, supra, 209 F. at 120-121; Davidow and O'Boyle, Obscenity Laws in England and the United States: A Comparative Analysis, 56 Nebraska L.Rev.

249, 273 (1977).

While this Court has not exhaustively analyzed the "pruriency" concept, the cases discussing it are internally consistent. All show less concern with dictionary definitions of "prurient" than with the function served by the concept. Its purpose is to initially, but not conclusively, evaluate the expression in terms of first amendment interests. The required appeal must heighten, exacerbate, or otherwise stimulate sexual longing or desire, without regard to whether the stimulated desire is wholesome or not, to permit the proper application of the remaining prongs of the Miller test. See, e.g. Mutual Film Corp. v. Industrial Com., 236 U.S. 230, 232 (1916), cited with approval in Roth v. United States, supra, 354 U.S. at 484, fn. 20. The post- Roth decisions of this Court reflect this concern and did not require the

appeal to be shameful or morbid.

The Roth court considered as synonyms for "prurient interest" phrases such as "lustful thoughts" or "lascivious longings," taking care to make certain each phrase was predicated with a verb indicating stimulation. Id.[1] If the "erotically arousing" material provides "sexual stimulation" to the "salaciously disposed" the purpose of the factor of "prurient" is satisfied. Ginzburg v.United States, supra, 383 U.S. at

[1] The Ninth Circuit's and the appellees' heavy reliances on the Roth court's reference in footnote 20, to the Model Penal Code's definition of "prurient interest" is historically and logically misplaced. The Commentaries' example rested on its perceived societal interest in deterring "the deliberate stimulation and commercial exploitation of emotional tensions" and simply restricted obscenity to the "erotic." If the sole purpose of the material is to arouse or stimulate that which is erotic, this 1957 Model Penal Code perception of the function of "prurient" was satisfied. Model Penal Code § 207.10, et seq. (Tent. Draft No. 6, 1957).

470-471. No further requirement compelled a trier of fact to evaluate whether the stimulation was wholesome or not.

In Michkin v. New York, 383 U.S. 502 (1966), this Court rejected as "unrealistic" an interpretation of the "prurient interest" factor that would require any further showing except "stimulating the erotic." Id. at 508. This view was affirmed in a later case, which recognized that obscenity could be prohibited if, the expression was, "in some significant way, erotic." Cohen v. California, 403 U.S. 15, 20 (1971). The Miller decision did nothing to alter this requirement of stimulative appeal or impact. Indeed, it reaffirmed the view that obscene material has a specific judicial meaning "which derives from the Roth case, i.e. obscene material 'which deals with sex.'" Miller v. California, supra, 413 U.S. at 18, fn. 2. While Miller did

nothing to refine the concept, it did eschew any suggestion that a national standard of what appealed to "prurient interest" was constitutionally mandated. Id. at 30. Instead, this Court implicitly recognized that "prurient interest" involved perceptions of either intuition or physical stimulation or both, and deferred to the jury system in making this assessment rather than fastening the national standard of "abstract formulation." Id. The Miller court deferred to Roth's earlier formulation of "prurient interest" as sufficient.[2]

In Splawn v. California, this Court cited

[2] It is urged that this Court has long accepted the view that the "prurient" prong embraces both the application of words that reflect a stimulative interest in sex, or an intuitive feeling that the appeal is to sexual arousal. Roth v. United States, 354 U.S. at 486, fn. 20; Jacobellis v. Ohio, supra, 378 U.S. at 197 (Stewart, J., concurring) ["I know it when I see it."]

numerous earlier cases that distinguished "prurient interest" as an appeal to sexual desire or arousal, and not to the exposition of ideas. If the expression is deliberately represented as "erotically arousing," then the reader was forced to accept them as prurient; accordingly, the prurient test was satisfied because the reader looked for "titillation, not saving intellectual content." 431 U.S. at 595, 598, citing Ginzburg v. United States, supra, 388 U.S. at 470. The Splawn court's reasoning provided historical consistency to the concept of "prurient interest" and set it apart as a value-neutral factor. The application of the remaining Miller prongs, therefore, are determinative of the full test of obscenity. Miller v. California, supra, 413 U.S. at 30.

It is clear that Roth's treatment of "pruriency" has both retained its constitutional

significance, and actually embraced a far more flexible directive on the purpose of the "pruriency" prong and the manner in which the states may define it. Miller v. California, supra, 413 U.S. at 30. This Court has never held that "pruriency" embraces solely an appeal to the shameful or morbid interest in sex. "Within the boundaries staked out by Miller, the states retain broad latitude" to establish their anti-obscenity laws. Smith v. United States, 431 U.S. 291, 310 (1977)(Powell, J., concurring.) So long as a state utilizes a definition of "pruriency" that embraces words indicating an appeal to sexual desire or arousal, stimulation, or inciting an interest in sex, the constitutional imperative of this Miller prong is satisfied.

The definition of "prurient" found in Washington's anti-obscenity law, HB 626, meets the purpose of this prong by providing a textual

definition towards physical stimulation, arousal, or a non-cognitive interest in sex. §1(8) defines "prurient" as that which "incites lasciviousness or lust." [Emphasis supplied.] Clearly, this language fulfills the historical and logical purpose of the "pruriency" prong by distinguishing sexual arousal or desire from a protected intellectual interest in sex. Rather than being fully determinative of the ultimate question of obscenity, which was the erroneous assumption of the Ninth Circuit's opinion, application of this language moved the expression to the next test of Miller. Miller v. California, supra, 413 U.S. at 30; cf. J. R. Distributors Inc. v. Eikenberry, 725 F. 2d at 491. The language of §1(8) does not punish mere sexual desire; it separates a class of expression determined as prurient to permit full application of the Miller obscenity test. On this basis, it both meets the purpose of the "prurient" prong

and facilitates full application of the constitutional obscenity test of Miller v. California.

CONCLUSION

The Ninth Circuit Court of Appeals erred when it overturned the Dictrict Court and held the Washington statute to be unconstitutional. Thus, the Ninth Circuit should be reversed and the statute upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 1984, three copies of the foregoing Brief of Appellant Brockett were sent by U.S. Mail, Postage Prepaid, to all counsel required to be served:

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CLERK

No. 84-28 and 84-143
CONSOLIDATED

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1984

No. 84-28

DONALD C. BROCKETT,

Appellant,

v.

SPOKANE ARCADES, INC., et al.,

Appellees.

No. 84-143

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Appellants,

v.

J-R DISTRIBUTORS, INC., et al.,

Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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*Appellees J-R Distributors, Inc. and Spokane Arcades, Inc. are listed because they are included in the captions and representative of the case. There is no intent to exclude the other plaintiffs, namely: Azure Entertainment Corporation of Washington; Jack R. Burns, in his representative capacity as Executor of the Estate of Selom F. Burns; Playtime Theatres, Inc., a Washington Corporation; Kukio Bay Properties, Inc., a Washington Corporation; The American Civil Liberties Union of Washington; Madrona Publishers, Inc., Superior Publishing Company; Washington Library Association; Pacific Northwest Booksellers Association; Motion Pictures Exhibitors of Washington, Alaska and Northern Idaho; Washington State Council of Teachers of English; Washington Library Media Association; and The Community College Librarian and Media Specialists Association of Washington. This procedure is used only in the interest of brevity.

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The following opinions, decisions, judgments and orders have been omitted in printing this appendix because they appear on the following pages in the Appendix to the printed Jurisdictional Statement (JS) of appellant Eikenberry:

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

C-82-223-RJM Spokane Arcades, Inc. vs. The Honorable Kenneth Eikenberry, et al.

Date	NR.	Proceedings
1982		
Apr 2	1	COMPLAINT For Declaratory Judgment and Preliminary and Permanent Injunction Issued Summons
5	2	MOTION For Temporary Restraining Order
5	3	ORDER To Show Cause Why Temporary Restraining Order Should Not Issue (RJM) (defts to appear & show cause on 4/8/82 @ 1:30 p.m.) cc: Atty Doug Harris
6	4	NOTICE OF APPEARANCE (Deft Eikenberry)
*8	5	ADDITIONAL AUTHORITIES in Support of Motion For Temporary Restraining Order
8	6	APPLICATION For Permission to Participate
8	7	ORDER (Robert Eugene Smith granted permission to participate as counsel in this case) (RJM) cc: Atty Burns
9	8	SUMMONS — served Brockett and Sloane
13	9	MEMORANDUM & ORDER (deft shall bring no action under this legislation until determination on the merits; pltfs brief due 5/3/82; defts' response 5/18 & hearing set 6/7/82) (RJM) cc: Attys Burns, Atty Gen, Spokane & Olympia; Brockett & Sloane

Date	NR.	Proceedings
*8	—	HEARING RE: Preliminary Injunction S/RJM
16	10	AFFIDAVIT of Mailing (#4)
22	11	NOTICE of Appearance (Deft Brockett)
22	12	DEFT'S ANSWER to Pltf's Complaint (Brockett)
22	13	AFFIDAVIT of Mailing (#11,12)
26	14	NOTICE of Appearance (Deft Sloane)
27	15	AFFIDAVIT of Service (#1,2,3 to ATG)
30	16	DEFT EIKENBERRY'S ANSWER to Pltf's Complaint
May 3	17	CONSOLIDATED MEMORANDUM of Authorities in Support of Pltfs' Complaints for Declaratory Judgment
3	18	DEFT EIKENBERRY'S FIRST REQUEST For Production of Documents
18	19	CONSOLIDATED MEMORANDUM Of Authorities in Opposition to Pltf's Complaints for Declaratory Judgment and for Injunctive Relief (Deft City)
18	20	CONSOLIDATED MEMORANDUM of Authorities in Response to Pltfs' Memorandum (Deft State)
18	21	MEMORANDUM of Authorities (Deft Brockett)
Jun 1	22	PLTF'S OBJECTION to Deft Eikenberry's First Request For Production of Documents
7	—	NON-JURY TRIAL S/RJM Court's determination: Under Advisement
9	23	ORDER Granting Pltfs' Motion For Shortening Time & Denying Motion to Strike (RJM) cc: Attorneys

Date	NR.	Proceedings
2	24	CONSOLIDATED MOTION & AFFIDAVIT in Support of Consolidated Motion to Strike & Request For Oral Argument
2	25	CONSOLIDATED MEMORANDUM of Authorities in Support of Pltfs' Motion to Strike
2	26	CONSOLIDATED MOTION For Order Shortening Time
2	27	CERTIFICATE of Service (#24,25,26)
15	28	DEFT DONALD C. BROCKETT'S POST TRIAL MEMORANDUM
16	29	CERTIFICATE of Service (#28)
Jul 2	30	ORDER OF CONSOLIDATION (C-82-223, C-82-230, C-82-231, C-82-239, C-82-240, C-82-283 & C-82-354 consolidated) (RJM) cc: Attorneys
2	31	MEMORANDUM DECISION (pltf's prayer for injunctive relief is denied) (RJM) cc: Attys
20	32	CONSOLIDATED MEMORANDUM in Opposition of Stay (Deft)
21	33	CERTIFICATE of Service (re #32)
23	34	ORDER (RJM) (exhibits 1 thru 11 admitted) cc: attys
26	35	ORDER (RJM) (denying pltfs' prayer for injunctive relief; dismissing action; granting pltfs' motion for stay pursuant to Rule 6(i) of 9CCA rules; said stay to remain in effect until 9CCA either grants or denies application) cc: attys COB-
26	36	JUDGMENT on Decision by the Court (that judgment is entrd denying pltfs' prayer for injunctive relief; action is dismissed; pltf's motion for stay is

Date	NR.	Proceedings
		granted upon condition that application for stay pending appeal be made to 9CCA pursuant to Rule 6(i) of 9CCA rules; said stay to remain effective until 9CCA either grants or denies application) cc: attys COB-41-209
29	37	MOTION To Alter or Amend Judgment (Pltf)
Aug 11	38	ORDER (pltf's motion to amend the judgment is denied) (RJM) cc: Attorneys
Sep 10	39	NOTICE OF APPEAL (pltf) cc's 9CCA, Attys Burns & Smith, A.G., attys Brockett & Robinson
Sep 13	40	COPY 9CCA Docket Fee Payment Notification Form — ($5 Clerk's fee and $65 9CCA fee paid) — original forwarded to 9CCA
13	—	Forwarded original Case Information Sheet and copy of docket entries to 9CCA
Oct 1	41	DESIGNATION of Reporter's Transcript (pltf atty Burns) cc's attys Burns, Smith, Gregoire, Brockett & Robinson; Ct Rptr Lenhart
1	42	NOTICE of Designation of Transcript (pltf atty Burns)
Nov 1	43	REPORTER'S TRANSCRIPT (6-07-82 S/RJM) (Lenhart)
1	44	COPY 9CCA CERTIFICATE of Record — original forwarded to 9CCA
29	45	COPY 9CCA ORDER (appellee's motion to consolidate is granted)
Dec 15	46	COPY 9CCA ORDER (applnts granted extension to 1-05-83 to file opening brief)

Date	NR.	Proceedings
20	47	COPY 9CCA ORDER (applnts granted extension to 1-05-83 to file opening brief) (applnts Burns, Playtime Theatres, Kukio Bay, & Spokane Arcades)
27	48	DESIGNATION of Clerk's Record — (pltf atty Burns) cc's 9CCA, attys Burns, Gregoire, Brockett & Robinson
1983		
Jan 17	49	COPY 9CCA ORDER (applnts granted extension thru 1-19-83 to file opening brief)
Feb 7	50	COPY 9CCA ORDER (no oversized brief; no further extensions; appellees request for costs denied; Wash. Publications Distributors Assoc. granted to be amicus curiae)
Mar 10	51	DESIGNATION of Clerk's Record (appellees A.G.) cc's 9CCA, attys Burns, Smith, Brockett, Robinson & A.G. Gregoire
Apr 6	52	COPY 9CCA ORDER (Applnt's motion to strike from record on appeal "Appendix I" attached to A.G.'s Consolidated Memorandum of Authorities, is granted)[1]
May 5	—	FORWARDED Record on Appeal to 9CCA

[1]This entry is in error. The District Court on June 8, 1982 denied the Motion to Strike.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

C-82-230-RJM J-R Distributors, Inc. vs. Kenneth Eikenberry, et al.

Date	NR.	Proceedings
1982		
Apr 6	1	COMPLAINT For Declaratory and Injunctive Relief Pursuant to Federal Civil Rights Act, 42 USC 1983 — Issued Summons
6	2	MEMORANDUM of Points & Authorities in Support of Temporary Restraining Order and Preliminary Injunction
8	3	NOTICE Of Appearance (Deft Sullivan)
8	4	MEMORANDUM Of Points & Authorities in Opposition to Temporary Restraining Order & Preliminary Injunction on Behalf of Deft Jeffrey C. Sullivan
8	—	HEARING RE REQUEST FOR TRO & PRELIMINARY INJUNCTION (S/RJM)
8	5	SUMMONS — served Defts ATG, County & City
8	6	NOTICE of Appearance (re Deft ATG)
8	—	HEARING RE PRELIMINARY INJUNCTIONS (S/RJM)
13	7	MEMORANDUM AND ORDER (RJM) (deft shall bring no action under this legislation until determination on the merits; pltfs brief due 5/3/82; defts' response 5/18/82; and hearing set 6/7/82) cc: Attys Maxey, Brown-Weston, Atty Gen., Spokane & Olympia; Brockett, Sloan, Sullivan & Andrews

Date	NR.	Proceedings
26	8	NOTICE of Appearance for James Sloane
26	9	NOTICE of Appearance (re Deft Brockett)
26	10	DEFENDANT'S ANSWER to Plaintiff's Complaint (Deft Brockett)
26	11	AFFIDAVIT of Mailing (re #9 & 10)
30	12	DEFT EIKENBERRY'S ANSWER to Plaintiff's Complaint
May 3	13	DEFT EIKENBERRY'S FIRST REQUEST for Production of Documents
13	14	MEMORANDUM of Points and Authorities in Opposition to Declaratory Judgment on Behalf of Deft Jeffrey C. Sullivan
18	15	MOTION for Sanctions by Court for Pltf's Failure to Comply with Court Order (Deft Eikenberry)
18	16	MEMORANDUM in Support of Motion for Sanctions by Court for Pltf's Failure to Comply with Court Order (Deft Eikenberry)
18	17	NOTICE Setting Date and Place of Hearing on Motion (re #15)
18	18	AFFIDAVIT of Mailing (re #15, 16 & 17)
21	19	MOTION to Permit Plaintiffs' Original Brief to be Deemed Their Brief for Trial on the Merits
21	20	CONSOLIDATED MEMORANDUM of Pltfs J-R Distributors, Inc. and Azure Entertainment Corporation of Washington in Opposition to Defts' Motion for Sanctions by Court for Pltfs' Failure to Comply with Court Order
21	21	AFFIDAVIT of Mailing (re #19 & 20)

Date		NR.	Proceedings
Jun	3	22	CONSOLIDATED REPLY MEMORANDUM of Pltfs J-R Distributors, Inc., and Azure Entertainment Corporation of Washington
	3	23	DEFENDANTS' ANSWER to Pltfs' Complaint (Deft Sullivan & Andrews)
	7	—	NON-JURY TRIAL ON MERITS (S/RJM) Advisement
	7	24	AFFIDAVITS of Service (re #22)
	9	25	ORDER Denying Defts' Motion for Sanctions and Granting Pltfs' Motion to Permit Pltfs' Original Brief to be Deemed Their Brief for Trial on the Merits (RJM) cc: attys
	11	26	CONSOLIDATED POST TRIAL MEMORANDUM of Pltfs J-R Distributors, & Azure Entertainment Corporation of Washington
	14	27	AFFIDAVITS of Service (re #26)
	15	28	DEFT DONALD C. BROCKETT'S POST TRIAL MEMORANDUM
	15	29	CONSOLIDATED MEMORANDUM in Response to Pltf's Post Trial Memorandum
July	2	30	ORDER OF CONSOLIDATION (RJM) (C-82-223, C-82-230, C-82-231, C-82-239, C-82-240, C-82-283 and C-82-354 are consolidated) cc: attys
	2	31	MEMORANDUM DECISION (RJM) (denying plaintiffs' prayer for injunctive relief) cc: attys
	20	32	CONSOLIDATED MEMORANDUM in Opposition of Stay (Deft)
	21	33	CERTIFICATE of Service (Re #32)
	23	34	ORDER (RJM) (exhibits 1 thru 11 admitted) cc: Attys

Date	NR.	Proceedings
26	35	ORDER (RJM) (denying pltfs' prayer for injunctive relief; dismissing action; granting pltfs' motion for stay pursuant to Rule 6(i) of 9CCA rule; said stay to remain in effect until 9CCA either grants or denies application) cc: attys COB-41-208
July 26	36	JUDGMENT on Decision by the Court (that judgment is entrd denying pltfs' prayer for injunctive relief; action is dismissed; pltf's motion for stay is granted upon condition that application for stay pending appeal be made to 9CCA pursuant to Rule 6(i) of 9CCA rule; said stay to remain effective until 9CCA either grants or denies application) cc: Attys COB-41-210
29	37	MOTION to Alter or Amend Judgment (pltf)
30	38	NOTICE OF APPEAL (pltf) cc: 9CCA, Attys Garrou, Maxey, Sullivan, Robinson, Andrews, Brockett & Atty Gen
30	39	COPY 9CCA Docket Fee Payment Notification Form — ($5 Clerk's fee & $65 9CCA fee paid) — original forwarded to 9CCA
30	—	Forwarded original Case Information Sheet and copy of docket entries to 9CCA
Aug 11	40	ORDER' (pltf's motion to amend the judgment is denied) (RJM) cc: Attorneys
16	41	COPY 9CCA ORDER (82-3441 & 82-3442 consolidated)
Oct 1	42	NOTICE of Designation of Transcript (pltf atty Burns)

Date	NR.	Proceedings
15	43	COPY 9CCA ORDER (applnt's 8-02-82 motion for stay or injunction pending appeal is granted; d.c.'s stay of decision will remain in force during pendancy of this appeal)
15	44	DESIGNATION of Reporter's Transcript (pltf-applnt atty Brown) cc's attys Brown, Maxey, Sullivan, Robinson & Brockett, and Ct Rptr Lenhart; cc's to atty Andrews and Att Gen
Nov 1	45	REPORTER'S TRANSCRIPT (6-07-82 S/RJM) Lenhart (#43 C-82-223)
1	46	COPY 9CCA CERTIFICATE of Record — original forwarded to 9CCA
29	47	COPY 9CCA ORDER (appellees' motion to consolidate is granted)
Dec 15	48	COPY 9CCA ORDER (applnts granted extension to 1-05-83 to file opening brief)
Dec 20	49	COPY 9CCA ORDER (applnts granted extension to 1-05-83 to file opening brief) (applnts Burns, Playtime Theatres, Kukio Bay Properties & Spokane Arcades)
1983		
Jan 17	50	COPY 9CCA ORDER (applnts granted extension thru 1-19-83 to file opening briefs)
24	51	DESIGNATION of Clerk's Record (applnts) ccs 9CCA, 7 attys
Feb 7	52	COPY 9CCA ORDER (no oversized brief; no further extensions; appellees request for costs denied; Wash. Publications Distributors Assoc. granted to be amicus curiae)

Date	NR.	Proceedings
Mar 10	53	DESIGNATION of Clerk's Record (appellees A.G.) cc's attys Maxey, Brown, Sullivan, Robinson, Brockett, A.G. Gregoire and 9CCA
Apr 6	54	COPY 9CCA ORDER (Applnt's motion to strike from record on appeal "Appendix I" attached to A.G.'s Consolidated Memorandum of Authorities, is granted)[2]
May 5	—	FORWARDED Record on Appeal to 9CCA

[2]This entry is in error. The District Court on June 8, 1982 denied the Motion to Strike.

UNITED STATE DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

NO.

COMPLAINT FOR DECLARATORY JUDGMENT AND PRELIMINARY AND PERMANENT INJUNCTION

SPOKANE ARCADES, INC., a Washington Corporation,
Plaintiff,

vs.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only; DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only; and JAMES SLOANE, Spokane City Attorney, in his representative capacity only,
Defendants.

COMES NOW, Spokane Arcades, Inc., a body corporate of the State of Washington, by and through its attorneys, Jack R. Burns, Robert Eugene Smith and Arthur M. Schwartz, and seeks a declaratory judgment, as well as a preliminary and permanent injunction, with respect to the State of Washington *Engrossed Substitute House Bill 626*, (hereinafter referred to as "H.B. 626"); and in support of their cause of action, state:

I. JURISDICTION

1. This is a civil action whereby plaintiff prays for a preliminary and permanent injunction enjoining defendants and each of them from in any way attempting to enforce the provisions of H.B. 626, a copy of which is attached hereto as Exhibit "A" in support of this complaint, the contents of which are incorporated herein by

reference; on the grounds that H.B. 626 is unconstitutional as written, and as the same is threatened to be applied to the plaintiff in the case at bar. Further, plaintiff prays for a declaratory judgment to determine the constitutionality of said H.B. 626. The allegations to be set forth in the premises establish that there are presented questions of actual controversy between the parties involving substantial constitutional issues in the said statute as written and/or in its potential threatened application and as such is repugnant to the rights of the plaintiff herein under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. Jurisdiction is conferred on this Court for the resolution of the substantial constitutional questions presented by the provisions of 28 USCA §1331(A) which provides in pertinent part:

> (A) The District Courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

as well as 28 USCA §1343(3), which provides in pertinent part that the District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

> To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States * * *

and the organic law which further authorizes the institution of this suit founded on 42 USCA §1983, which provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution

> and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Prayer for declaratory relief is founded on Rule 57 of the Federal Rules of Civil Procedure, as well as 28 USCA §2201, which provides in pertinent part:

> * * * any Court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought * * *

The jurisdiction of this Court to grant injunctive relief is conferred by 28 USCA §2202, which provides:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted after reasonable notice and hearing against any adverse party whose rights have been determined by such judgment.

The provisions of Rule 65 of the Federal Rules of Civil Procedure, providing for a preliminary and a permanent injunction, further authorize this Court to grant injunctive relief consistent with the procedures set forth therein.

II. PARTIES

3. The Honorable Kenneth Eikenberry is named in his capacity as a person under the new section three of H.B. 626 who may bring an action for maintaining a moral nuisance.

4. Donald C. Brockett is named in his capacity as a person under the new section three of H.B. 626 who may bring an action for maintaining a moral nuisance, and who also may initiate an information under the new section eight.

5. James Sloane is named in his capacity as a person under the new section three of H.B. 626 who may initiate an action for maintaining a moral nuisance.

6. Spokane Arcades, Inc., a body corporate of the

State of Washington, operates three bookstores in the State of Washington, City of Spokane, located at: 309 W. Riverside; 325 W. 2nd; and 1125 W. 1st; respectively. These stores offer for sale books and magazines to the interested public as well as operating an Arcade on the premises, which permits exhibition of motion picture films in machines that are coin operated.

III. FACTUAL ALLEGATIONS

7. That no criminal, quasi-criminal and/or other civil proceeding is pending in any of the State Courts in the State of Washington against the plaintiff, its agents, servants and employees, seeking a penalty for maintaining a moral nuisance or charging the crime of promoting pornography under the provisions of H.B. 626, as of the date of filing of this suit. That should a lawsuit be filed in one or more of the State Courts of the State of Washington, by the Attorney General of this State or any Prosecuting Attorney, City Attorney, or City Prosecutor, to secure a penalty for maintaining a moral nuisance or committing the crime of promoting pornography, the same would still be within the jurisdiction of the United States District Court under an exemption recognized in *Younger v. Harris*, 401 U.S. 3727 L.Ed.2d, 669, 91 S.Ct. 746 (1971); which exception does not bar a federal district court from intervening when a state civil proceeding is pending and/or when one is brought after the initiation of the federal suit because H.B. 626 may fairly be characterized as "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph and whatever manner and against whomever an effort may be made to apply it."

8. H.B. 626 which passed by a vote of a majority of both Houses of the Washington State Legislature and is to become law when signed by the Governor, may be characterized as "flagrantly and patently violative of express constitutional provisions" both in general theory as it constitutes a prohibited prior restraint which is repugnant

to the First Amendment to the Constitution of the United States as made applicable to the State under the Fourteenth Amendment as well, the respective provisions thereof are also constitutionally deficient in both substance and procedure and violative of express constitutional guarantees under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

9. The plaintiff is engaged in the business of exhibiting for commercial purposes, motion picture films and/or offering for sale books and magazines to the interested adult public of sexually oriented press materials presumptively protected by the First Amendment to the Constitution of the United States. *Heller v. People of the State of New York*, 413 U.S. 483 (1973); *Roaden v. Commonwealth of Kentucky*, 413 U.S. 496 (1973).

10. The purpose and scheme of H.B. 626, if it were to become law, is to enable the Attorney General and any Prosecuting Attorney, City Attorney, or City Prosecutor of this State to bring an action to effectively close any book store, theatre or arcade offering for sale to the interested adult public, sexually oriented press materials by reason of the imposition of exorbitant fines.

11. Plaintiff affirmatively alleges that the entire statutory scheme designed to be reached by H.B. 626, as it applies to the plaintiff, or is threatened to be applied to the plaintiff should the same become law, is constitutionally deficient and constitutes a prohibited prior restraint in violation of the plaintiff's rights under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as well as the rights of the adult citizens and adult visitors to this State to their respective constitutional rights to have access to such sexually oriented press materials. Under Section two of H.B. 626, the following are declared to be moral nuisances:

1. Any and every place in the State where lewd films are publicly exhibited as a regular course of busi-

ness, or possessed for the purpose of such exhibition;

2. Any and every place in the State where lewd film is publicly exhibited, or possessed for such purpose at a place which is a moral nuisance under this section;
3. Any and every place of business in the State in which lewd publications constitute a principal part of the stock in trade;
4. Every place which, as a regular course of business, is used for the purpose of lewdness or prostitution, and every such place in or upon which acts of lewdness or prostitution are conducted, permitted, carried on, continued, or exist.

12. That the proposed statutory scheme is a blatant prohibited prior restraint and would constitute a denial of the plaintiff's First, Fourth, Fifth, Sixth and Fourteenth Amendment rights as guaranteed to it under the Constitution of the United States, in the following respects:

A. Plaintiff, in order to continue operation, would have to become a self-censor and as such, this would constitute a chilling effect upon free speech.
B. Plaintiff would have to make its own individual determination as to whether or not the material sold or exhibited at its respective establishments violates the definition of what is lewd matter as contained in H.B. 626, which, parenthetically speaking, *does not* track the permissible definition of what constitutes obscene press materials and is without the ambit of the First Amendment as set forth by the majority of the Supreme Court of the United States in the case of *Miller v. California*, 413 U.S. 15 (1973).

13. Plaintiff affirmatively alleges that H.B. 626 is patently unconstitutional on its face and the effect of enforcement thereof would preclude plaintiff and others similarly situate from selling, exhibiting and/or offering for sale press materials which are presumptively protected under the First Amendment to the Constitution of the United States.

14. That interested adult citizens of the State of Washington as well as interested adult visitors to the State of Washington will be denied their First Amendment rights to receive and have access to sexually oriented press materials by the statutory scheme envisioned by H.B. 626 for reasons having to do with vagueness, overbreadth, prior restraint, and the taking of a property interest without due process of law.

15. Plaintiff affirmatively alleges that the potential chilling effects caused by the overly broad and vague definition of lewd matter and the exorbitant fines would be so pervasive that, in effect, it would be a total bar to plaintiff's selling, distributing or exhibiting, as well as citizens and visitors of the State of Washington from purchasing or viewing, presumptively protected press materials, including, but not limited to: newspapers, magazines, periodicals, printed books and motion picture film; all of which are presumptively protected by the First Amendment to the Constitution of the United States.

16. That the passing into law of H.B. 626 will require the plaintiff to engage in self-censorship in an effort to preguess and predetermine what in effect will affront the contemporary community standards of the State of Washington, what appeals to the prurient interests of the average person of the State of Washington, what press materials, when considered as a whole, and in the context in which they are used, possess literary, artistic, political or scientific value, all of which determinations must be made in advance by plaintiff and others similarly situated, on a subjective basis in order to avoid the closing of the facilities operated by them and attempt to preserve and protect their rights to remain in existence in said state and offer to the interested adult public presumptively protected press materials.

17. The threat of unlimited fines against a theatre or other facility which offers for sale presumptively protected press materials on the basis of an over-expansive definition of lewd matter, is a very serious form of censorship and has

a chilling effect on the First Amendment rights of plaintiff and others similarly situate, as well as citizens and visitors to the State of Washington who desire to view sexually explicit motion picture film fare and/or purchase books or magazines or periodicals at any of the business locations operated by the plaintiff and others similarly situate.

18. Plaintiff alleges that it is entitled to declaratory relief in this matter in order to avoid the necessity of having to act at its peril or to act upon its own interpretation of what rights are available to it or in the alternative, to abandon its rights because of the fear of incurring damages and losses in multiple lawsuits.

IV. BASIS FOR RELIEF

19. H.B. 626 is clearly repugnant to the First, Fourth, Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States, as written, and as threatened to be applied for the following reasons:

A. Said H.B. 626 is void for vagueness in that if fails to establish by its terms definitive standards, criteria and/or other controlling guides defining words like "moral nuisance" or "lewd matter" and offers a definition of what is obscene which is at variance with the definitional standards set forth by the United States Supreme Court in *Miller v. California, supra*, and as such would violate plaintiff's rights to due process under the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States.

B. H.B. 626 is void for impermissible overbreadth by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms in that the same sets forth standards at variance with those minimum standards proscribed by the Supreme Court of the United States, in connection with the exercise of First Amendment rights.

C. Said H.B. 626 is further void in that the same, by

its terms, places an impermissible burden upon the exercise of plaintiff's First Amendment rights, and has a chilling effect on such freedoms.

D. Said H.B. 626 is further void as violative of the Equal Protection Clause of the Fourteenth Amendment, in that the same creates a statutory classification which has no rational relationship to a valid public purpose nor is the same necessary to the achievement of a compelling state interest by the least drastic means.

E. Said H.B. 626 is repugnant to the substantive due process provision of the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States because the same permits deprivation of liberty and/or property interests for the exercise of First Amendment rights by unreasonable, arbitrary and capricious means without a showing of a real and substantial relationship to any state subordinating interest which is compelling to justify state action limiting the exercise by plaintiff of its First Amendment freedoms.

F. Said H.B. 626 is impermissibly overbroad and repugnant to the procedural due process requirements of the Fifth and Fourteenth Amendments to the Constitution of the United States, in that the same employs means lacking adequate safeguards which due process demands to assure non-obscene materials sought to be distributed to an interested adult public as an ongoing business activity, the constitutional protection of the First Amendment, to which said materials are entitled.

G. Said H.B. 626 is vague and impermissibly overbroad and, thus, repugnant to the First, Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, in that said H.B. 626, by its provisions, permits inherent powers of censorship and suppression constituting a prior re-

straint on the exercise of plaintiff's First Amendment rights.

20. The particular sections of H.B. 626 are clearly repugnant to the First, Fourth, Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States, as written, and as threatened to be applied for the following reasons:

A. Said H.B. 626 and, in particular, Section 1 as it purports to define knowledge, creates an impermissible presumption that certain matter is patently offensive.

B. (1) Said H.B. 626 and in particular, Section 1(2)(b), purports to define certain standards for determining what is obscene and contains the following language:

> "Which explicitly depicts or describes patently offensive representations or descriptions of"

whereas the United States Supreme Court, in setting forth standards which may be used by states to prohibit obscene material either on a civil or criminal basis in the case of *Miller V. California, supra*, has worded the definition this way:

> "Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state laws;"

This language creates an impermissible presumption that certain acts or depictions are patently offensive.

(2) A further part of the definition of lewd matter found in this section reads:

> "(c) which, when considered as a whole, and in the context in which it is used, lacks serious literary artistic, political or scientific value."

The United States Supreme Court in the Miller Test used the definition "whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." The departure from the stand-

ards approved by the United States Supreme Court, in *Miller v. California*, *supra*, thus renders those words and the variances of H.B. 626 to be void for vagueness in violation of plaintiff's First Amendment rights.

D. Said H.B. 626 and, in particular, Section 1(2)(b)(iii), is void for impermissible overbreadth in that it includes within its definition violent or destructive acts of human or animal mutilation or dismemberment.

E. Said H.B. 626 and, in particular, Section 1(3), purports to include within its definition of obscene all those meanings which its definition of obscene all those meanings which the word "lewdness" has under the common law. This expansion from the standards approved in *Miller v. California*, *supra*, renders the definition void for vagueness.

F. Said H.B. 626 and, in particular, Section 1(8), departs from the definition in *Miller v. California*, *supra*, of prurient as a "shameful or morbid interest in sex" and as such renders the definition void for vagueness.

G. Said H.B. 626 and, in particular, Section 2(1), is void for vagueness and overbreadth in that it fails to define "as a regular course of business".

H. Said H.B. 626 and, in particular, Section 2(3), is void for vagueness and overbreadth in that it fails to define "principal part of the stock in trade".

I. Said H.B. 626 and, in particular, Section 2(4), is void for vagueness and overbreadth in that it fails to define "regular course of business" and it brings within the prohibition and sanctions of the act, places where a single act of lewdness, whether criminal or not, has occurred.

J. Said H.B. 626, in particular, Section 4(2), is void for vagueness in that it allows a penalty of unlimited and indeterminate amount. Said section is violative of the First, Fourth, Fifth, Eighth and

Fourteenth Amendments to the Constitution of the United States and has the effect of not only chilling but silencing protected speech. Said section is also void for vagueness and violative of plaintiff's rights under the Fourteenth Amendment in that the consideration of "willfulness" and of "profits" renders its application as to the amount of penalty uncertain.

K. Said H.B. 626 and, in particular, Section 5, is void in that it creates an open invitation to city's to commence vexatious and harassing litigation in order to fatten their own treasuries.

L. Said H.B. 626 and, in particular, Section 8, is unconstitutionally vague and overbroad in the following particulars:

(1) Said section incorporates that definition in Section 1 of "knowledge" which includes an erroneous presumption that the material within the lewd matter is patently offensive;

(2) Said section is unconstitutionally vague and overbroad in that it uses as its definition of obscene matter, the over-expansive definition of Section 1;

(3) Said section is unconstitutionally vague and overbroad in that it creates the crime of "promoting pornography". All pornography is not obscene. The mere charging of the crime will insure a conviction because the name of the crime will indicate to jurors that protected, non-obscene pornographic material is within the sweep of the statute;

(4) The penalty sections of Section 8 are violative of plaintiff's Eighth Amendment rights and constitute a denial of equal protection; and are not based upon any rational reason or classification and are arbitrary and capricious;

(5) The penalty provisions of Section 8 are void for vagueness and are violative of rights secured

under the Fourteenth Amendment to the Constitution of the United States in that the consideration of "willfulness" and "profits" render their application and the amount of penalty uncertain and act as a prior restraint on protected expression because of their draconian potential;

(6) Section 8 denies plaintiff the equal protection of the laws in that it punishes communication and expressive conduct when engaged in for a profit, but does not do so when done for a non-commercial purpose.

21. Pursuant to its plenary powers, this Court may take jurisdiction to determine:

A. Whether H.B. is violative of Article 2, Section 19 of the Constitution of the State of Washington. Article 2, Section 19 provides that no bill shall embrace more than one subject. H.B. 626 is violative of that provision in that it deals with and modifies such diverse subjects as, but not limited to, hotels and motels, theatres, bookstores, prostitution, lewdness, public nuisances, obscene material and the substantive material criminal provisions of RCW 9.68 et seq.

B. Whether section 10 of H.B. 626 is violative of Article 2, Section 1(b) (Amendment 7) of the Constitution of the State of Washington. Article 2, Section 1(b) (Amendment 7) provides for the right of referendum except in the case of emergency legislation. The circumstances surrounding the enactment of H.B. 626 do not justify the inclusion of an emergency clause.

22. Plaintiff herein avers that its rights afforded under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States will be violated by said defendants in both the enactment of a wholly unconstitutional law and in the threatened enforcement thereof, and unless this Court grants the relief prayed for, said plaintiff and others similarly situate, as

well as the interested adult public, will suffer irreparable harms.

23. Plaintiff has no adequate remedy at law, and unless the individual defendants and each of them, are permanently enjoined and restrained and all others acting in concert with them, plaintiff alleges that certain citizens of the state will carry out their announced intent to close plaintiff's establishments in the manner set forth herein.

24. No remedy at law would suffice to protect plaintiff in that a money judgment would in no way reimburse plaintiff for the loss and, indeed, the extinguishment of its constitutional rights to sell and exhibit books, magazines, periodicals, newspapers and motion picture film fare.

25. That the public interest would be served by such injunctive relief in that unless such relief is granted, the public right to purchase books, magazines, periodicals, newspapers and to view motion picture films will have been permanently extinguished.

26. That no substantial harm will befall other parties to this civil action in that a preliminary injunction will simply preserve the *status quo* until such time as all parties to this civil action may be heard by this Court and a determination of the issues involved herein be made by this Court.

27. That the likelihood of plaintiff being ultimately successful in having substantial portions of H.B. 626 declared unconstitutional is great, in that said statute sets up a form of prior restraint, self-censorship and the obliteration of plaintiff's and the general public's First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights as guaranteed by the United States Constitution, including the taking of plaintiff's property interests without due process of law.

Such forms of censorship and prior restraint are not permitted in a free society governed by a Constitution as drafted by our founding fathers and such overly broad measures have been struck down by the United States Supreme Court which recognizes the chilling effect of such

procedures, and the great danger that exists in tampering with the fragile, but essential, free speech and press provisions of the United States Constitution.

V. RELIEF SOUGHT

28. Plaintiff is entitled to and desires this Court to enter a declaratory judgment, declaring H.B. 626 to be unconstitutional as written or, in the alternative, the major portions thereof to be repugnant to the First, Fourth, Fifth, Sixth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.

Further, plaintiff seeks a preliminary and permanent injunction to prohibit the enforcement by Kenneth Eikenberry, as Attorney General of the State of Washington, Donald C. Brockett, as Spokane County Prosecutor, and James Sloane, as Spokane City Attorney, and their agents, servants and employees, attorneys and/or others acting under the direction and/or control from enforcing the provisions or any one of them of H.B. 626.

WHEREFORE, plaintiff prays:

1. That the defendants be required to answer forthwith, this complaint in conformance with the rules and practices of this Honorable Court.

2. That a declaratory judgment be rendered declaring H.B. 626 to be unconstitutional as written, in whole or in part, and that this Court further declare H.B. 626 to be unconstitutional in its threatened application to the plaintiff.

3. That a preliminary injunction issue from this Court upon hearing restraining the defendant Attorney General, Donald C. Brockett as Spokane Prosecuting Attorney, and Jame Sloane, as Spokane City Attorney, from in any way attempting to enforce the provisions of H.B. 626 as well as their agents, servants, employees and attorneys, and/or others acting under their direction and control pending a hearing and determination on the plaintiff's application for a permanent injunction.

4. That upon final hearing, this Court issue its permanent injunction prohibiting the Attorney General and/or Spokane Prosecuting Attorney and/or the Spokane City Attorney, their agents, servants and attorneys, and/or others in concert with them from enforcing or attempting to enforce the provisions of H.B. 626 in whole or in part.

5. That plaintiff be awarded its reasonable attorney's fees herein pursuant to 42 USCA §1988.

6. And for such other and further relief as may be appropriate under the circumstances of this case.

DATED this 31st day of March, 1982.

Respectfully submitted,
HUBBARD, BURNS & MEYER

BY /s/ _____
Jack R. Burns

OF COUNSEL:

Robert Eugene Smith, Esq.
16133 Ventura Blvd.
Penthouse Suite E
Encino, California 91436
(213) 981-9421

Arthur Schwartz, Esq.
1500 Western Federal
Savings Building
Denver, Colorado 80202
(303) 893-2500

AFFIDAVIT

STATE OF WASHINGTON }
} ss.
COUNTY OF SPOKANE }

COMES NOW, W. H. Boomer, who, after being duly sworn, did depose and state:

1. That Spokane Arcades, Inc., is a body corporate of the State of Washington, in good standing.

2. That affiant is the President of said corporation, and is authorized to speak on behalf of said corporation.

3. That said corporation is the plaintiff in the within proceedings.

4. That affiant has read the Complaint to which this Affidavit is affixed and asserts that the factual allegations contained therein, are true and correct to the best of his information, knowledge and belief.

5. That the enforcement of H.B. 626 will, if upheld, have the effect of depriving plaintiff of access to the marketplace to exhibit its presumptively protected First Amendment wares of erotic film fare; and further, will deny to interested adults access to such material for their information, appetite, or educational, literary or artistic tastes; as well as subject plaintiff, its agents, servants and employees to confiscatory fines and will chill plaintiff in the exercise of its First Amendment rights of free speech; and will further destroy the property and interest of said corporation in its business locations operated in Spokane, Washington and subject said plaintiff corporation to grievous financial harm.

/s/ _____
W. H. Boomer

SUBSCRIBED AND SWORN to before me this _____ day of _____, 1982.

_____
Notary Public in and for the State of Washington residing at _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. C-82-230-RJM

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF PURSUANT TO FEDERAL CIVIL RIGHTS ACT, 42 U.S.C. § 1983

J-R DISTRIBUTORS, INC.,

Plaintiff,

-VS-

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington; JAMES SLOAN, in his official capacity as City Attorney for the City of Spokane, Washington; JEFFREY C. SULLIVAN, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington; and FRED ANDREWS, in his official capacity as City Attorney for the City of Yakima, Washington,

Defendants.

FIRST CAUSE OF ACTION FOR INJUNCTIVE RELIEF
(42 U.S.C. § 1983)

Nature of Complaint

1. This is an action seeking declaratory and injunctive relief against the threatened enforcement of a newly enacted Washington State statute providing for civil and criminal penalties against the dissemination of obscene matter. A copy of the Act appears in Appendix A and is incorporated as though fully set forth.

Jurisdiction

2. This action arises under the Constitution and laws of the United States, particularly the first and fourteenth amendments to the United States Constitution. The jurisdiction of this Court therefore is invoked under Title 28, U.S.C. § 1331.

3. This is also an action under the Federal Civil Rights Act, Title 42 U.S.C. § 1983, to redress by injunctive relief the deprivation, under color of state law, of rights, privileges and immunities secured to plaintiffs by the Constitution of the United States, and particularly the first and fourteenth amendments thereto. The jurisdiction of this Court therefore is invoked under Title 28 U.S.C. § 1343.

4. This is also a case where plaintiffs are seeking a declaration of their rights under the Constitution and the laws of the United States. Under Title 28, U.S.C. §§ 2201 and 2202, this Court, in a case of actual controversy within its jurisdiction, may declare the rights of plaintiffs seeking such declaration.

Plaintiff

5. Plaintiff J-R Distributors, Inc., is a corporation duly organized and existing under the laws of the State of Washington and owns and operates bookstores which sell books, magazines, newspapers, films and videotapes to the adult public, including material describing and/or depicting sexual activities and themes. The bookstores are located throughout the State of Washington. In this district, plaintiff operates the PayLess Bookstore at West 327 2d Avenue, Spokane, Washington 99204, and Yakima Magazine Center at 18 S. 1st, Yakima, Washington 98901.

Defendants

Defendant Kenneth Eikenberry is the Attorney General for the State of Washington. Defendant Donald C. Brockett is the prosecuting attorney for Spokane County,

State of Washington. Defendant James Sloane is the City Attorney for the City of Spokane, Washington. Defendant Jeffrey C. Sullivan is the prosecuting attorney for the County of Yakima. Defendant Fred Andrews is the City Attorney for the City of Yakima, Washington. Defendants, and each of them, are authorized to bring criminal and/or civil actions pursuant to the legislation here challenged.

The conduct of said defendants, as hereinafter alleged, was performed under color of the laws of the State of Washington and therefore constitute acts of the state within the meaning of the fourteenth amendment to the United States Constitution and Title 42, U.S.C. § 1983.

8. On April 1, 1982, the Governor of the State of Washington signed into law, to take effect immediately, legislation significantly changing the definition of obscene matter and authorizing new and severe penalties, both civil and criminal, for its dissemination. A complete copy of the new legislation is attached hereto as Appendix A.

9. Sections 1 through 6 of the Act add a new chapter in Title 7 RCW which provides, inter alia, that places where "lewd matter" is sold or exhibited constitute a "moral nuisance". "Lewd matter" is defined as synonymous with "obscene matter" and is then further defined in section 1(2) as matter:

> "(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and
>
> (b) Which explicitly depicts or describes patently offensive representations or descriptions of:
>
> (i) Ultimate sexual acts, normal or perverted, actual or simulated; or
>
> (ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or
>
> (iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and
>
> (c) Which, when considered as a whole, and in

> the context in which it is used, lacks serious literary, artistic, political, or scientific value."

10. Section 3 authorizes the state attorney general, the prosecuting attorney for the county, or the city attorney for the city, where the alleged moral nuisance is located to bring a civil action in the superior court to impose a civil penalty for the maintenance of such moral nuisance.

11. Section 4 provides that upon a determination that a defendant has with knowledge maintained a moral nuisance, the court shall impose a civil penalty and judgment of an amount as the court may determine shall be appropriate. The Act specifies neither the minimum nor maximum amount of such civil penalty, nor prescribes any criteria for determining the amount, except for providing that:

> "In imposing the civil penalty, the court shall consider the wilfulness of the defendant's conduct and the profits made by the defendant attributable to the moral nuisance."

Section 5 provides that such civil penalties shall be paid into the general treasury of the governmental unit commencing the civil action.

12. Section 6 provides:

> "Nothing in this chapter applies to the circulation of any material by any recognized historical society or museum, any library of any college or university, or to any archive or library under the supervision and control of the state, county, municipality, or other political subdivision."

13. Section 8 of the Act also adds to chapter 9.68 RCW a new section creating the criminal offense of "promoting pornography" and making it a class C felony. A person is guilty of promoting pornography who, for profit making purposes and with knowledge, sells, exhibits, displays or produces any lewd matter as previously defined.

14. The punishment for promoting pornography is that generally prescribed for a class C felony, except special fines are authorized only for promoting pornography

that consist of not less than $5,000 nor more than $50,000 per count. The court is directed, in imposing the criminal penalty, to consider the wilfulness of the defendant's conduct and the profits made by the defendant attributable to the felony.

15. **Unconstitutionality of the New Legislation**

The new obscenity legislation, Appendix A, is unconstitutional on its face and as construed and applied by defendants to plaintiffs herein. The Act abridges the exercise of the freedom of speech and press by plaintiffs and the general public, deprives plaintiffs of due process of law, and denies plaintiffs the equal protection of the laws, all in violation of the first and fourteenth amendments to the United States Constitution.

Irreparable Injury

16. Defendants threaten to enforce the new legislation, Appendix A, against plaintiffs unless they cease the sale and/or exhibition of sexually oriented books, magazines, films, videotapes, and other media of communication which plaintiffs contend are not obscene but, instead, are entitled to the protection of the free speech and press provisions of the Constitution.

17. Unless restrained by this Court, defendants will enforce the new legislation against plaintiffs unless they forego dissemination of media of communication which plaintiffs contend are entitled to the protection of the first amendment, thereby chilling the exercise by plaintiffs of the freedoms of speech and press and denying the general public access to expression entitled to first amendment protection, all to plaintiffs' irreparable injury, for which there is no adequate remedy at law.

SECOND CAUSE OF ACTION FOR DECLARATORY RELIEF

18. Paragraphs 1 through 15 of the complaint are incorporated by this reference as though fully set forth.

19. There is a bona fide dispute between the parties in that plaintiffs allege and defendants deny that the new legislation, Appendix A, violates the free speech and press provisions of the first amendment and the due process and equal protection provisions of the fourteenth amendment to the United States Constitution.

Wherefore plaintiffs pray for judgment as follows:

1. For a temporary restraining order and preliminary and permanent injunctions restraining defendants from enforcing against plaintiffs the provisions of Appendix A.

2. For a declaration that Appendix A is unconstitutional on its face and as construed and applied by defendants to plaintiffs in violation of the free speech and press, due process, and equal protection guarantees contained in the first and fourteenth amendments to the United States Constitution.

3. For attorney fees and costs pursuant to the Civil Rights Attorneys Fees Awards Act of 1976 (42 U.S.C. § 1988), for costs of suit, and for such other and further relief as the Court may deem proper.

CARL MAXEY
THE MAXEY LAW FIRM

By: /s/_____
CARL MAXEY
Attorney for Plaintiff

JOHN H. WESTON
DAVID M. BROWN
BROWN, WESTON & SARNO

By: /s/_____
JOHN H. WESTON
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-82-231 RJM

MEMORANDUM AND ORDER

AZURE ENTERTAINMENT CORPORATION OF WASHINGTON,
Plaintiff,

vs.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington; and JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington,
Defendants.

The Washington Legislature recently enacted House Bill 626, an Act relating to pornography and defining penalties for its promotion; the law became effective on April 1, 1982. Plaintiff has brought this action attacking the validity of the statute on a wide range of fronts. It is contended, *inter alia*, that the Act: (1) is overbroad and vague; (2) is more restrictive than the standard mandated by the United States Supreme Court; (3) presents an issue of prior restraint; (4) has a chilling effect on First Amendment freedoms; (5) through the imposition of civil penalties, allows a measure of punishment unfettered by constitutional restraints; and (6) with regard to criminal penalties, constitutes a denial of equal protection.

Defendants, admitting for the most part that this legislation is among the most stringent of its kind in the country and certainly on the cutting edge of the law, point to the overwhelming popular support enjoyed by this and similar past attempts at bringing hard core obscenity under control. They further contend that the statute represents the first realistic opportunity in years for local

government to take an effective role in curtailing pornography in line with prevailing community standards.

At the present stage of proceedings, the ultimate merits of these contentions are not at issue. The sole inquiries before the Court are: (1) whether this is a proper case in which to apply the abstention doctrine; and (2) the propriety of temporarily enjoining enforcement of the Act pending a determination of the legal issues advanced.

Arguments presented in support of abstention are not convincing given the fact that no actions of either a criminal or civil nature are currently pending against the plaintiff. *See 414 Theater Corp, v. Murphy*, 499 F.2d 1155, 1160-61 (2d Cir. 1974). Further, a recent Supreme Court decision suggests that an action brought pursuant to 42 U.S.C. § 1983 may be entertained by a federal court on its own merits independent of the abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37 (1971). *See generally Wooley v. Maynard*, 430 U.S. 705 (1977).

The test for extraordinary relief is discussed in some detail in *Aleknagik Natives, Ltd. v. Andrus*, 648 F.2d 496 (9th Cir. 1981):

> The effect of *Inglis* was to require the issuance of a preliminary injunction upon a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Id. at 502, construing *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 526 F.2d 86 (9th Cir. 1975).

The facts in the present case militate toward application of the latter test. After full consideration of arguments presented both in brief and oral presentation, I conclude that: (1) plaintiff's objections present substantial questions worthy of detailed study; (2) that if plaintiff should ultimately prevail in whole or in part, it will have suffered substantial and irremediable harm if this Act were to be enforced in the interim; (3) that the potential for harm to defendants can be framed only in terms of a slight delay

and will involve no irremediable damage; and (4) that the public interest will be best served by rendering a final determination of the merits prior to allowing any prosecution under the Act.

The balancing test mandated by *Aleknagik* and *William Inglis*, *supra*, thus swings decidedly in favor of granting a brief stay. Publishers, authors, representatives of unpopular political groups, and, of course, the press in this Nation, have fought long and hard to preserve their freedom of expression from legislative or judicial interference.

The continuing and often bitter conflict between First Amendment values and obscenity legislation is fraught with complexities that lie at the very heart of our constitutional system. It should be emphasized that by granting this preliminary injunction, I have in no way passed upon the substantive merits. It is true that the people of Washington, both as an electorate and through their representatives, overwhelmingly favor a tougher approach to controlling pornography. At the same time, no judge may overlook his sworn duty to ensure that all laws, however popular or unpopular, meet the basic requirements embodied in a Constitution which has served to anchor fundamental freedoms cherished by this Nation over the past two centuries. The provisions of this Order will permit the Court to discharge that duty in an informed and deliberate manner.

Therefore it is

ORDERED that defendants shall bring no prosecutorial action under this legislation until a determination on the merits may be reached pursuant to the schedule in this Order. This will in no way interfere with the various enforcement agencies' authority to pursue any litigation now pending under R.C.W. 9.68.010, or to bring new actions under any other appropriate legislation outside the bounds of HB 626.

IT IS FURTHER ORDERED that plaintiff shall file a brief no later than May 3, 1982, defendants' responsive brief will be due no later than May 18th, and a hearing will be held

on June 7, 1982 at 9:30 a.m. It appears at this time that no evidentiary matters need be considered. Should any of the parties believe otherwise, or should there be any other matters they desire to present to the Court, a telephonic conference will be scheduled upon request.

DONE BY THE COURT this 13th day of April, 1982.

/s/ _____
Robert J. McNichols
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

No. C-82-223-RJM

DEFENDANT'S ANSWER TO PLAINTIFF'S COMPLAINT

SPOKANE ARCADES, INC., a Washington Corporation,
Plaintiff,

v.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only; DONALD C. BROCKETT, as Prosecuting Attorney of Spokane County, in his representative capacity only; and JAMES SLOANE, Spokane City Attorney, in his representative capacity only,

Defendants.

COMES NOW the defendant, Donald C. Brockett, herein and in answer to the complaint, admits, denies and alleges as follows:

I. JURISDICTION

1. The defendant, Donald C. Brockett, denies the jurisdiction of this court for the reason that this court should abstain from any consideration of this lawsuit because a declaratory judgment action could be brought under state law by virtue of the Revised Code of Washington Chapter 7.24 in fact specifically refers to RCW 7.24.140 and the harmonizing with Federal laws on the subject of declaratory judgments and decrees. Furthermore, there has been no showing by the plaintiff's that the state courts will not apply appropriate federal principles of constitutional law in such a declaratory judgment action.

2. In answering paragraph 2, defendant, Donald C. Brockett, denies that jurisdiction is conferred upon this

court on the basis of 28 USCA § 1343(3), in view of the fact that there has been no deprivation under color of any state law, or statute, of the privileges or immunities secured by the Constitution of the United States with reference to the cause of action pleaded by the plaintiff. In addition, the plaintiff inappropriately pleads a violation of 42 USCA § 1983, in view of the fact that no person under color of any statute or ordinance of any state has caused the plaintiff to be subjected to the deprivation of any rights, privileges or immunities secured by the constitution and, therefore, this portion of the plaintiff's complaint should be stricken. Defendant admits that if the court has jurisdiction under 28 USCA § 2201, the court may only render a declaratory judgment regarding the statute because defendant represents that he will obey the judgment of the court, therefore, any injunction would be inappropriate.

Any other matters pleaded in this particular section of the complaint are denied by virtue of the fact that the defendant Donald C. Brockett, is without information and, therefore, is unable to form a belief with respect to the same.

II. FACTUAL ALLEGATIONS

3. In answering the allegations of paragraph 7 of the complaint, the defendant, Donald C. Brockett, admits that no criminal, quasi-criminal and/or other civil proceeding is pending in any of the State Courts in the State of Washington against the plaintiff, its agents, servants and employees, seeking a penalty for maintaining a moral nuisance or charging the crime of promoting pornography under the provisions of HB 626 as of the date of the filing of this suit. That for these reasons the court should abstain in entertaining this lawsuit on the grounds that it would otherwise interfere in the Federal-State relations with regard to comity. The defendant denies that the statute may be fairly characterized as "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph and whatever manner and against whomever an effort may be made to apply it."

4. In answering the allegations of paragraph 8, the

defendant denies that the legislation constitutes a prohibited prior restraint. In fact, the procedure set out by the statute does no more than allow a normal civil procedure with the possibility of a judgment, in an amount based on the judgment of the court, at the conclusion of the case. Therefore, the statutory procedure does no more than any other civil statute.

5. In answering the allegations of paragraph 9, the defendant is without information and, therefore, is unable to form a belief and denies the same.

6. In answering the allegations of paragraph 10, the defendant denies that the purpose and scheme of HB 626 is to enable the closing of any bookstore, theatre or arcade offering for sale to the interested adult public, sexually oriented press materials by reason of the imposition of exorbitant fines. Instead, the legislation simply allows a judgment based upon the appropriate findings of the court after the procedure has been concluded.

7. In answering the allegations of paragraphs 11-13, the defendant is without information and, therefore, is unable to form a belief and denies the same.

8. In answering paragraph 14, the defendant denies that the statute is vague, overbroad, constitutes a prior restraint, or is the taking of a property interest without due process of law. Instead, the statute is not impermissibly vague, does not restrain anything, and if a judgment is declared at the conclusion of a case, does not constitute a taking of property interest without due process of law.

9. In answering paragraphs 15-17, the defendant denies that there is any chilling effect to the application of a statute causing the plaintiff to engage in self-censorship because of concern of unlimited fines which might be levied against them. A judgment which may result from a lawsuit does not constitute an unlimited fine.

10. In answering the allegations of paragraph 18, the defendant denies that the plaintiff is entitled to a declaratory relief by virtue of the fact that until there is an "actual case or controversy" this court should not become concerned and rather should abstain so that when an actual case is brought against the plaintiff, the plaintiff may seek a declaratory judgment in the appropriate state court

action, thereby conserving scarce judicial resources.

III. BASIS FOR RELIEF

11. In answering paragraph 19, the defendant denies each and every allegation contained therein.

12. In answering the allegations of paragraph 20, the defendant denies each and every allegation contained therein.

13. In answering the allegations of paragraph 21, the defendant denies that the court may take jurisdiction to determine this matter.

14. In answering the allegations of paragraph 22, the defendant denies that the plaintiff's rights will be violated by the defendant in a threatened enforcement of a statute in violation of the Constitution of the United States.

15. In answering the allegations of paragraph 23, the defendant denies that the plaintiff has no adequate remedy at law, and in fact the adequate remedy at law is under Revised Code of Washington 7.24, a declaratory judgment action in the state courts.

16. In answering the allegations of paragraph 24-27, the defendant is without information and, therefore, is unable to form a belief and denies the same.

IV. RELIEF SOUGHT

17. In answering the allegations of paragraph 28, the defendant denies the plaintiff is entitled to a declaratory judgment, and the court should abstain in favor of the state courts deciding this issue, rather than declaring the statute to be unconstitutional. In addition, it is inappropriate that the court permanently enjoin enforcement of the statute by the defendant. With respect specifically to prayer number 5 in paragraph 28 of the complaint, the defendant moves to strike the request for reasonable attorney's fees pursuant to 42 USCA § 1988, in view of the fact that such an application must be based upon an action under 42 USCA § 1983, which is inappropriate in this case in view of the fact that the plaintiff has not, under color of any statute of any state been subjected to the deprivation of any rights, privileges or immunities secured by the con-

stitution and the laws, since no actions have been brought against the plaintiff under the statute.

V. DEFENSES

By way of further answer, and as matters of affirmative defense, the defendant, Donald C. Brockett, alleges as follows:

18. Defendant alleges as a defense, that this court should abstain from a determination in this matter in the interests of comity and further that the exceptions of *Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971), and *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975), do not warrant a determination on the merits.

Defendant alleges, as a defense, that this court should determine that HB 626 provides for a procedure which is not unconstitutionally vague on its face and the state courts may decide its constitutional application as provided for by *Village of Hoffman Estates v. Flipside, Hoffman Estates*, ___ U.S. ___, 71 L.Ed.2d 362, 102 S.Ct. ___ (1982).

VI. PRAYER

WHEREFORE, defendant, Donald C. Brockett, having fully answered the complaint of plaintiffs on file herein, said defendant prays that:

A. The plaintiff's complaint be dismissed with prejudice;

B. Plaintiff's request for a permanent injunction and declaratory judgment be denied;

C. That defendant be awarded costs herein and that the court grant such other relief as it deems proper.

DATED this 22nd day of April, 1982.

Respectfully submitted,

/s/ _____
Donald C. Brockett
Prosecuting Attorney for
Spokane County

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

No. C-82-230-RJM

DEFENDANT'S ANSWER TO PLAINTIFF'S COMPLAINT

J-R DISTRIBUTORS, INC.,

Plaintiff,

v.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only; DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only; and JAMES SLOANE, Spokane City Attorney, in his representative capacity only; JEFFREY C. SULLIVAN, in his official capacity as Prosecuting Attorney for Yakima County; and FRED ANDREWS in his official Capacity as City Attorney for the City of Yakima,

Defendants.

COMES Now the defendant, Donald C. Brockett, herein and in answer to the complaint, admits, denies and alleges as follows:

I. JURISDICTION

1. The defendant, Donald C. Brockett, denies the jurisdiction of this court for the reason that this court should abstain from any consideration of this lawsuit because a declaratory judgment action could be brought under state law by virtue of the Revised Code of Washington Chapter 7.24 in fact specifically refers to RCW 7.24.140 and the harmonizing with Federal laws on the subject of declaratory judgments and decrees. Furthermore, there has been no showing by the plaintiff's that the state courts will not

apply appropriate federal principles of constitutional law in such a declaratory judgment action.

2. In answering paragraph 2 and 3, defendant, Donald C. Brockett, denies that jurisdiction is conferred upon this court on the basis of 42 USCA § 1983, in view of the fact that no person under color of any statute or ordinance of any state has caused the plaintiff to be subjected to the deprivation of any rights, privileges or immunities secured by the constitution and, therefore, this portion of the plaintiff's complaint should be stricken. In addition, there is no jurisdiction on the basis of 28 USCA § 1343, in view of the fact that there has been no deprivation under color of any state law, or statute of the privileges or immunities secured by the Constitution of the United States with reference to the cause of action pleaded by the plaintiff.

3. In answering paragraph 4, defendant, Donald C. Brockett, denies that the plaintiff is entitled to an injunction on the basis of 28 USCA §§ 2201 and 2202, in view of the fact that the defendant affirmatively states that he will obey any declaratory judgment of this court with reference to the constitutionality of the statute in question, and, therefore, an injunction would be totally inappropriate.

4. In answering the allegations of paragraph 5, with the heading Plaintiff, the defendant is without information and, therefore, is unable to form a belief and denies the same.

5. In answering the allegations of paragraph 6, the defendant admits that the parties are as stated and are authorized to bring criminal and/or civil actions pursuant to the legislation.

6. In answering the allegations of paragraph 7, the defendant denies that any conduct has occurred under color of the laws of the State of Washington which constitute acts of the State within the meaning of the United States Constitution, in view of the fact that no action has been brought against the plaintiff.

7. In answering the allegations of paragraphs 8-14, the defendant admits the allegations contained in said paragraphs.

8. In answering the allegations of paragraph 15, the defendant denies that the statute is unconstitutional on its

face, and furthermore, the plaintiff has inappropriately pleaded that the defendants have construed and applied the statute to the plaintiffs. No action has been brought against the plaintiff on the basis of this statute. The defendant denies each and every allegation contained in paragraph 15.

9. In answering the allegations of paragraphs 16 and 17, the defendant denies each and every allegation contained therein. In fact, there is an adequate remedy at law, by virtue of RCW 7.24 which provides for a declaratory judgment in state court.

10. In answering the allegations paragraph 19, the defendant admits the allegations as contained therein.

II. PLAINTIFF'S PRAYER

11. In answering the allegations of paragraph 1 of the prayer, the defendant denies that the plaintiff is entitled to a preliminary and permanent injunction by virtue of the fact that the defendant states that he will obey the judgment of this court in a declaratory judgment and, therefore, an injunction is totally inappropriate.

12. In answering the allegations of paragraphs 2 and 3 of the prayer, the defendant denies the plaintiff is entitled to a declaratory judgment, and the court should abstain in favor of the state courts deciding this issue, rather than declaring the statute to be unconstitutional. In addition, it is inappropriate that the court permanently enjoin enforcement of the statute by the defendant. With respect specifically to prayer concerning attorney's fees, the defendant moves to strike the request for reasonable attorney's fees pursuant to 42 USCA § 1988, in view of the fact that such an application must be based upon an action under 42 USCA §1983, which is inappropriate in this case because the plaintiff has not, under color of any statute of any state been subjected to the deprivation of any rights, privileges or immunities secured by the constitution and the laws, since no actions have been brought against the plaintiff under the statute.

III. DEFENSES

By way of further answer, and as matters of affirmative defense, the defendant, Donald C. Brockett, alleges as follows:

13. Defendant alleges as a defense, that this court should abstain from a determination in this matter in the interests of comity and further that the exceptions of *Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971), and *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975), do not warrant a determination on the merits.

Defendant alleges, as a defense, that this court should determine that HB 626 provides for a procedure which is not unconstitutionally vague on its face and the state courts may decide its constitutional application as provided for by *Village of Hoffman Estates v. Flipside, Hoffman Estates*, ___ U.S. ___, 71 L.Ed.2d 362, 102 S.Ct. ___ (1982).

IV. DEFENDANT'S PRAYER

WHEREFORE, defendant, Donald C. Brockett, having fully answered the complaint of plaintiffs on file herein, said defendant prays that:

A. The plaintiff's complaint be dismissed with prejudice;

B. Plaintiff's request for a permanent injunction and declaratory judgment be denied;

C. That defendant be awarded costs herein and that the court grant such other relief as it deems proper.

DATED this _____ day of April, 1982.

Respectfully submitted,

/s/ Donald C. Brockett
Prosecuting Attorney for
Spokane County

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

No. C-82-223-RJM

DEFENDANT EIKENBERRY'S ANSWER TO PLAINTIFF'S COMPLAINT

SPOKANE ARCADES, INC., a Washington corporation,
Plaintiff,

v.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only; DONALD C. BROCKETT, Prosecuting Attorney for Spokane County, in his representative capacity only; and JAMES SLOANE, Spokane City Attorney, in his representative capacity only,
Defendants.

Defendant Kenneth Eikenberry, in his official capacity as Attorney General for the State of Washington, in answer to plaintiff's Complaint for Declaratory and Injunctive Relief admits, denies and alleges as follows:

I.

Defendant denies the allegations of jurisdiction contained in paragraphs 1-2.

II.

Defendant admits that he is the Attorney General for the State of Washington. The defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraphs 4-6 entitle "Parties".

III.

Defendant denies the allegations contained in para-

graphs 7-18 entitled "Factual Allegations" in that plaintiff paraphrases the legislation in question and defendant submits the referenced legislation speaks for itself. Said paragraphs constitute a statement of the ultimate legal conclusions in question before this Court. Further, defendant is without sufficient knowledge to form a belief as to the truth of the factual allegations contained therein.

IV.

Defendant denies paragraphs 19-27 for the reasons stated in paragraph III of defendant's Answer.

V.

Defendant denies paragraph 28 entitled "Relief Sought" for the reason that it constitutes a statement of the ultimate decision to be determined by this Court.

VI.
DEFENSES

Pursuant to F.R.C.P. 12 (b), defendant Eikenberry asserts here the defense that there is a lack of subject matter jurisdiction and requests dismissal of the Complaint on that ground.

VIII.
PRAYER

Having answered, defendant prays that plaintiff's Complaint be dismissed with prejudice; that plaintiff's request for declaratory and injunctive relief be denied; that the Court declare SHB 626 to be constitutional; that defendant be awarded reasonable costs, disbursements, attorneys' fees and such other and further relief as may be appropriate and as the Court may deem proper.

DATED this 21st day of April, 1982.

KENNETH O. EIKENBERRY
Attorney General

/s/ _____
CHRISTINE GREGOIRE
Senior Assistant Attorney General
Attorney for Defendant Eikenberry

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-82-230-RJM

DEFENDANT EIKENBERRY'S ANSWER TO PLAINTIFF'S COMPLAINT

J-R DISTRIBUTORS, INC.,

Plaintiff,

v.

KENNETH EIKENBERRY, in his capacity as Attorney General of the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington; and JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington; JEFFREY C. SULLIVAN, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington; and FRED ANDREWS, in his official capacity as City Attorney for the City of Yakima, Washington,

Defendants.

Defendant Kenneth Eikenberry, in his official capacity as Attorney General for the State of Washington, in answer to plaintiff's Complaint for Declaratory and Injunctive Relief admits, denies and alleges as follows:

I.

Defendant denies the allegation contained in paragraph 1 entitled "Nature of Complaint".

II.

Defendant denies the allegations of jurisdiction contained in paragraphs 2-5.

III.

Defendant is without knowledge sufficient to form a belief as to the truth of the allegations contained in the paragraph 5 entitled "Plaintiff".

IV.

Defendant admits that he is the Attorney General for the State of Washington. Defendant denies the allegations contained in the paragraph entitled "Defendants" with reference to defendant Eikenberry. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in the paragraph entitled "Defendants" with reference to any and all other named defendants.

V.

Defendant denies the allegations contained in the paragraphs 8, 9, 10, 11, 13 and 14, entitled "Facts" because plaintiff paraphrases the legislation in question and defendant submits the referenced legislation speaks for itself. Defendant admits paragraph 12 of Facts.

VI.

Defendant denies paragraph 15 entitled "Unconstitutionality of the New Legislation" for the reason that it constitutes a statement of the ultimate legal conclusions in question before this Court.

VII.

Defendant denies the allegations contained in paragraphs 16 and 17 entitled "Irreparable Injury."

VIII.

Defendant redenies and readmits with reference to paragraphs 1 through 15 of plaintiff's Complaint and plaintiff's Second Cause of Action for Declaratory Relief. Defendant Eikenberry admits paragraph 19.

IX.
DEFENSES

Pursuant to F.R.C.P. 12 (b), defendant Eikenberry asserts here the defense that there is a lack of subject matter jurisdiction and requests dismissal of the Complaint on that ground.

X.
PRAYER

Having answered, defendant prays that plaintiff's Complaint be dismissed with prejudice; the plaintiff's request for declaratory and injunctive relief be denied; that the Court declare SHB 626 to be constitutional; that defendant be awarded reasonable costs, disbursements, attorneys' fees and such other and further relief as may be appropriate and as the Court shall deem proper.

DATED this 19th day of April, 1982.

KENNETH O. EIKENBERRY
Attorney General

/s/ _____
CHRISTINE GREGOIRE
Senior Assistant Attorney General
Attorney for Defendant Eikenberry

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

No. C-82-223-RJM

CONSOLIDATED MEMORANDUM OF AUTHORITIES IN OPPOSITION TO PLAINTIFF'S COMPLAINTS FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF

SPOKANE ARCADES, INC., a Washington Corporation,
Plaintiffs,

v.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only, et al.,
Defendants.

No. C-82-239 RJM

PLAYTIME THEATRES, INC., a Washington Corporation,
Plaintiffs,

v.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington in his representative capacity only, et al.,
Defendants.

Comes now JAMES C. SLOANE, Corporation Counsel for the City of Spokane, in his representative capacity only, defendant in the above-entitled causes, through his attorney, RICHARD C. ROBINSON, Assistant Corporation Counsel, and submits the follow-

Second, the Court took the term "prurient interest" and placed upon it a specific, narrow interpretation.

Frankly, the words, defined separately, do not mean what the Court has interpreted. Thus, the term "prurient interest" has become a "term of art" or a shorthand for a "shameful or morbid interest in sex, nudity, or excretion." This is not uncommon in law, e.g., "reasonable man" or "clear and present danger".

So, the term "prurient" is properly defined. The term "prurient interest" on the other hand, is defined by case law as something slightly different. The use of both is neither improper nor narrowing.

Further, under Washington rules of statutory construction, both terms ("prurient" and "prurient interest") must be read in the context of the entire statute. *State v. Oyen*, 78 Wn.2d 909, 480 P.2d 766 (1971). Reading the entire statute, it becomes patently clear that the legislature intended to prohibit the sale and/or display of materials, intended to appeal to the "shameful or morbid interest" in sex, nudity, or excretion.

Accordingly, Defendant submits that the definition of "prurient" in the statute does not render the statute overbroad.

B. The use of the phrase "in the context in which it is used" narrows rather than expands the Miller definition.

Defendant submits that the three prong test of *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), represents the line between protected and unprotected speech. However, the court certainly would not nor could not prevent a state from edging away from the line into the area of unprotected speech so as to insure that no protected speech is within the

conduct regulated by this sub-section must take place at a place of business. The state's ability to regulate businesses is unquestioned. *See*, e.g., *State v. Smith*, 93 Wn.2d

329, 610 P.2d 869 (1980). Absent a reasonable expectation of privacy, businesses in which lewdness or prostitution is carried on as a regular course of business, are moral nuisances by legislative decree. The section could not be clearer. Sub-section 2(4) is not vague.

Plaintiffs argument regarding "lewdness" is self-defeating. Whether or not plaintiff agrees with the definition, it cannot be said to be vague.

Conclusion

Defendant submits, for the reasons set forth above, that:

(1) Sections 1(8), 1(2)(c), and 1(2)(b) are not unconstitutionally overbroad

(2) Sections 1(3), 2(1), 2(3), and 2(4) are not unconstitutionally vague.

Defendant respectfully urges the court to deny plaintiffs' requested relief.

Respectfully submitted,

JAMES C. SLOANE
Corporation Counsel

By: /s/ _____
Richard C. Robinson
Assistant Corporation Counsel

Attorneys for Defendant
James C. Sloane

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-82-223-RJM

CONSOLIDATED MEMORANDUM OF AUTHORITIES IN RESPONSE TO PLAINTIFFS' MEMORANDUM

SPOKANE ARCADES, INC., a Washington corporation,

Plaintiff,

v.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington in his official capacity only; DONALD C. BROCKETT, Prosecuting Attorney for Spokane County, in his representative capacity only; and JAMES SLOANE, Spokane City Attorney, in his representative capacity only,

Defendants.

No. C-82-239-RJM

PLAYTIME THEATRES, INC., a Washington corporation,

Plaintiff,

v.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only; DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only; and JAMES SLOANE, Spokane City Attorney, in his representative capacity only,

Defendants.

No. C-82-240-RJM

JACK R. BURNS, in his representative capacity as

EXECUTOR OF THE ESTATE OF SELOM F. BURNS,
Plaintiff,

v.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only,
Defendants.

Memorandum Page 1

subsequent to April 13, 1982 defendants by court order could bring no prosecutorial action under the legislation. Defendants have engaged in no *affirmative* conduct to enforce House Bill 626 against plaintiffs. Plaintiffs have not been *deprived* of a constitutional right. Plaintiffs have not established any threats have actually been made. Assuming arguendo that threats have been made, that alone is insufficient. Thus, plaintiffs have failed to meet the requisites for this Court to invoke jurisdiction under

C. HOUSE BILL 626 IS NOT FACIALLY OVERBROAD

D. HOUSE BILL 626 IS NOT UNCONSTITUTIONALLY VAGUE.

Defendant expressly adopts the legal arguments set forth in the brief of defendant Sloane, City Attorney for the City of Spokane with reference to this argument.

The argument is supported by the following:

> This Court has long recognized that a demonstrably overbroad statute or ordinance may deter the legitimate exercise of First Amendment rights. Nonetheless, when considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program. In accommodating those competing interests the court has held that a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts. *See Dombrowski v. Pfister*, 380 U.S. 479, 497 (1965) and its deterrent effect on legitimate expression is both real and substantial.

See Broadrick v. Oklahoma, 413 U.S. 601, 612-615 (1973).

Erznoznik v. City of Jacksonville, 422 U.S. 205, 216, 95 S.Ct. 2268, 2276 (1975).

It is not necessary to use the exact "few plain examples" set forth in *Miller v. California*, 413 U.S. 15, 25, 93 S.Ct. 2607, 2615 (1973). *People v. O'Neil*, 3223 N.E.2d 7, 8 (1974).

E. HOUSE BILL 626 NEITHER AUTHORIZES A PRIOR RESTRAINT ON PROTECTED EXPRESSION NOR INVIDIOUSLY CHILLS THE EXERCISE OF FIRST AMENDMENT RIGHTS.

Defendant expressly adopts the legal arguments set forth in the brief of defendant Donald Brockett, Spokane Prosecuting

remaining portions of the Act in light of its effect. Further, defendants request this Court consider such effect in light of the aforementioned case law and the "conclusive" presumption of divisibility.

IV.
CONCLUSION

For the foregoing reasons defendant Kenneth O. Eikenberry respectfully requests that plaintiffs' Complaint for Declaratory Judgment and Permanent Injunction be dismissed.

DATED this 18th day of May, 1982.

KENNETH O. EIKENBERRY
Attorney General

/s/ _____
CHRISTINE GREGOIRE
Senior Assistant Attorney General
Attorney for Defendant Eikenberry

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

No. C-82-223-RJM

MEMORANDUM OF AUTHORITIES

SPOKANE ARCADES, INC., a Washington Corporation,
Plaintiff,

v.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington in his representative capacity only; DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only; and JAMES SLOANE, Spokane City Attorney, in his representative capacity only,
Defendants.

and

PLAYTIME THEATRES, INC., a Washington Corporation,
Plaintiff,

v.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only; DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only; and JAMES SLOANE, Spokane City Attorney, in his representative capacity only,
Defendants.

Defendant, Donald C. Brockett, submits this memorandum in support of the validity of Substitute House Bill 626. Defendant, Donald C. Brockett, incorporates by refer-

ence the memoranda submitted by the other party defendants filed this date.

Memorandum of Authorities — 1

> uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk." (Citations omitted)

Hamling v. United States, supra, 418 U.S. at 124, quoting *United States v. Wurzbach*, 280 U.S. 396, 399, 74 L.Ed. 508, 50 S.Ct. 167 (1930).

The Act's scienter requirement reduces the impermissible amount of self-censorship suggested by plaintiffs, and postures the acts squarely within the fabric of the constitution. It thus has a very appropriate chilling effect on unprotected obscenity.

Respectfully submitted,

/s/ _____

DONALD C. BROCKETT
Prosecuting Attorney

DAVID A. SARACENO
Deputy Prosecuting Attorney

May 18, 1982

Memorandum of Authorities — 26

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

No. C-82-230-RJM

DEFENDANTS' ANSWER TO PLAINTIFF'S COMPLAINT

J-R DISTRIBUTORS, INC.,

Plaintiff,

v.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only; DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only; and JAMES SLOANE, Spokane City Attorney, in his representative capacity only; JEFFREY C. SULLIVAN, in his official capacity as Prosecuting Attorney for Yakima County; and FRED ANDREWS in his official capacity as City Attorney for the City of Yakima,

Defendants.

COME NOW the defendants, Jeffrey C. Sullivan and Fred Andrews, herein and in answer to the complaint, admit, deny and allege as follows:

I. JURISDICTION

1. The defendants, Jeffrey C. Sullivan and Fred Andrews, deny the jurisdiction of this court for the reason that this court should abstain from any consideration of this lawsuit because a declaratory judgment action could be brought under state law by virtue of the Revised Code of Washington Chapter 7.24 and in fact specifically refers to RCW 7.24.140 and the harmonizing with Federal laws on the subject of declaratory judgments and decrees. Furthermore, there has been no showing by the plaintiff that the state courts will not apply appropriate federal princi-

ples of constitutional law in such a declaratory judgment action.

2. In answering paragraphs 2 and 3, defendants, Jeffrey C. Sullivan and Fred Andrews, deny that jurisdiction is conferred upon this court on the basis of 42 USCA § 1983, in view of the fact that no person under color of any statute or ordinance of any state has caused the plaintiff to be subjected to the deprivation of any rights, privileges or immunities secured by the constitution and, therefore, this portion of the plaintiff's complaint should be stricken. In addition, there is no jurisdiction on the basis of 28 USCA § 1343, in view of the fact that there has been no deprivation under color of any state law, or statute of the privileges or immunities secured by the Constitution of the United States with reference to the cause of action pleaded by the plaintiff.

3. In answering paragraph 4, defendants, Jeffrey C. Sullivan and Fred Andrews, deny that the plaintiff is entitled to an injunction on the basis of 28 USCA §§ 2201 and 2202, in view of the fact that the defendants affirmatively state that they will obey any declaratory judgment of this court with reference to the constitutionality of the statute in question, and, therefore, an injunction would be totally inappropriate.

4. In answering the allegations of paragraph 5, with the heading Plaintiff, the defendants are without information and, therefore, are unable to form a belief and deny the same.

5. In answering the allegations of paragraph 6, the defendants admit that the parties are as stated and are authorized to bring criminal and/or civil actions pursuant to the legislation.

6. In answering the allegations of paragraph 7, the defendants deny that any conduct has occurred under color of the laws of the State of Washington which constitute acts of the State within the meaning of the United States Constitution, in view of the fact that no action has been brought against the plaintiff.

7. In answering the allegations of paragraphs 8-14, the defendants admit the allegations contained in said paragraphs.

8. In answering the allegations of paragraph 15, the defendants deny that the statute is unconstitutional on its face, and furthermore, the plaintiff has inappropriately pleaded that the defendants have construed and applied the statute to the plaintiff. No action has been brought against the plaintiff on the basis of this statute. The defendants deny each and every allegation contained in paragraph 15.

9. In answering the allegations of paragraphs 16 and 17, the defendants deny each and every allegation contained therein. In fact, there is an adequate remedy at law, by virtue of RCW 7.24 which provides for a declaratory judgment in state court.

10. In answering the allegations of paragraph 19, the defendants admit the allegations as contained therein.

II. PLAINTIFF'S PRAYER

11. In answering the allegations of paragraph 1 of the prayer, the defendants deny that the plaintiff is entitled to a preliminary and permanent injunction by virtue of the fact that the defendants state that they will obey the judgment of this court in a declaratory judgment and, there fore, an injunction is totally inappropriate.

12. In answering the allegations of paragraphs 2 and 3 of the prayer, the defendants deny the plaintiff is entitled to a declaratory judgment, and the court should abstain in favor of the state courts deciding this issue, rather than declaring the statute to be unconstitutional. In addition, it is inappropriate that the court permanently enjoin enforcement of the statute by the defendants. With respect specifically to prayer concerning attorney's fees, the defendants move to strike the request for reasonable attorney's fees pursuant to 42 USCA § 1988, in view of the fact that such an application must be based upon an action under 42 USCA § 1983, which is inappropriate in this case because the plaintiff has not, under color of any statute of any state been subjected to the deprivation of any rights, privileges or immunities secured by the constitution and the laws, since no actions have been brought against the plaintiff under the statute.

III. DEFENSES

By way of further answer, and as matters of affirmative defense, the defendants, Jeffrey C. Sullivan and Fred Andrews, allege as follows:

13. Defendants allege as a defense, that this court should abstain from a determination in this matter in the interests of comity and further that the exceptions of *Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971), and *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975), do not warrant a determination on the merits.

Defendants allege, as a defense, that this court should determine that HB 626 provides for a procedure which is not unconstitutionally vague on its face and the state courts may decide its constitutional application as provided for by *Village of Hoffman Estates v. Flipside, Hoffman Estates*, ___ U.S. ___, 71 L.Ed.2d 362, 102 S.Ct. ___ (1982).

IV. DEFENDANTS' PRAYER

WHEREFORE, defendants, Jeffrey C. Sullivan and Fred Andrews, having fully answered the complaint of plaintiff on file herein, said defendants pray that:

A. The plaintiff's complaint be dismissed with prejudice;

B. Plaintiff's request for a permanent injunction and declaratory judgment be denied;

C. That defendants be awarded costs herein and that the court grant such other relief as it deems proper.

DATED the 2nd day of June, 1982.

Respectfully submitted,

/s/ _____

JEFFREY C. SULLIVAN
Prosecuting Attorney for Yakima County, and as Attorney for Fred Andrews, City Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-82-223 RJM

SPOKANE ARCADES, INC., a Washington corporation,

Plaintiff,

-VS-

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only; DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only; and JAMES SLOANE, Spokane City Attorney, in his representative capacity only,

Defendants.

No. C-82-230 RJM

J-R DISTRIBUTORS, INC.,

Plaintiff,

-VS-

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney, Spokane County, State of Washington; JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington; JEFFERY C. SULLIVAN, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington; and FRED ANDREWS, in his official capacity as City Attorney for the City of Yakima, Washington,

Defendants.

No. C-82-231 RJM

AZURE ENTERTAINMENT CORPORATION OF WASHINGTON,

Plaintiff,

-VS-

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington; and JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington

Defendants.

No. C-82-239 RJM

PLAYTIME THEATRES, INC., a Washington corporation,

Plaintiff,

-VS-

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only; DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only; and JAMES SLOANE, Spokane City Attorney, in his representative capacity only and NORM MALENG, Prosecuting Attorney of King County in his representative capacity only,

Defendants.

No. C-82-240 RJM

JACK BURNS, in his representative capacity as EXECUTOR OF THE ESTATE OF SELOM F. BURNS,

Plaintiff,

-VS-

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only,

Defendant.

No. C-82-283 RJM

THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON:

MADRONA PUBLISHERS, INC.; SUPERIOR PUBLISHING COMPANY; WASHINGTON LIBRARY ASSOCIATION; PACIFIC NORTHWEST BOOKSELLERS ASSOCIATION; MOTION PICTURE EXHIBITORS OF WASHINGTON, ALASKA, AND NORTHERN IDAHO; WASHINGTON STATE COUNCIL OF TEACHERS OF ENGLISH; WASHINGTON LIBRARY MEDIA ASSOCIATION; and THE COMMUNITY COLLEGE LIBRARIAN AND MEDIA SPECIALISTS' ASSOCIATION OF WASHINGTON,

Plaintiffs,

-VS-

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only,

Defendant.

No. C-82-354-RJM

ORDER OF CONSOLIDATION

KUKIO BAY PROPERTIES, INC., a Washington corporation,

Plaintiff,

-VS-

NORM MALENG, Prosecuting Attorney of King County, in his representative capacity only,

Defendant.

Upon motion of the plaintiffs during oral argument and to facilitate judicial management of the future course of this litigation, it is hereby

ORDERED that these actions be consolidated.

DONE BY THE COURT this 2nd day of July, 1982.

/s/ _____

Robert J. McNichols
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

CIVIL ACTION FILE No. C-82-230-RJM

JUDGMENT

J-R DISTRIBUTORS, INC.,

Plaintiff,

vs.

KENNETH EIKENBERRY, in his official capacity as Attorney General, et al.,

Defendants.

This action came on for (hearing) before the Court, Honorable Robert J. McNichols, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered.

It is Ordered and Adjudged that judgment is entered denying plaintiff's prayer for injunctive relief; and the action dismissed. Plaintiff's motion for a stay is GRANTED upon condition that application for a stay pending appeal be made to the U.S. Court of Appeals pursuant to Rule 6(i) of the Ninth Circuit Rules of Appellate Procedure. The stay granted by this order shall remain effective until such time as the Court of Appeals either grants or denies the application.

Dated at Spokane, this 26th day of July, 1982.

/s/ _____
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
Jul - 2 1984
Phillip B. Winberry
Clerk, U.S. Court of Appeals

No. 82-3501

APPELLEE MALENG'S NOTICE OF APPEAL

PLAYTIME THEATRES, INC., a Washington corporation,
Plaintiff-Appellant,

vs.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only, DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only, and JAMES SLOANE, Spokane City Attorney, in his representative capacity only, NORM MALENG, Prosecuting Attorney of King County, in his representative capacity only,
Defendants-Appellees.

No. 82-3502

CONSOLIDATED WITH NOS. 82-3441, 82-3442, 82-3500, 82-3503, 82-3504

KUKIO BAY PROPERTIES, INC., a Washington corporation,
Plaintiff-Appellant,

vs.

NORM MALENG, Prosecuting Attorney for King County, in his representative capacity only,
Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Norm Maleng, in his official capacity as Prosecuting Attorney for the County of King, State of Washington, one of the defendant-appellees above named, hereby appeals to the Supreme Court of the United States from the April 6, 1984 order denying petition for rehearing of the 2-1 opinion, filed February 6, 1984, reversing the decision of the United States District Court for the Eastern District of Washington. The decision of the District Court held the challenged Washington State statute to be constitutional.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DATED this 28th day of June, 1984.

NORM MALENG
King County Prosecuting Attorney

/s/ _____
CHARLES S. HAMILTON III
Deputy Prosecuting Attorney
Attorneys for Defendant/Appellee

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
Jul - 2 1984
Phillip B. Winberry
Clerk, U.S. Court of Appeals

No. 82-3441

D.C. NO. CV 82-230

J-R DISTRIBUTORS, INC.,

Plaintiff-Appellant,

VS.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington, JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington, JEFFREY C. SULLIVAN, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington, and FRED ANDREWS, in his official capacity as City Attorney for the City of Yakima, Washington,

Defendants-Appellees.

No. 82-3442

D.C. NO. CV 82-231

AZURE ENTERTAINMENT CORPORATION OF WASHINGTON, INC.,

Plaintiff-Appellant,

VS.

KENNETH EIKENBERRY, in his official capacity as

Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington; and JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington,

Defendants-Appellees.

No. 82-3500

D.C. NO. CV 82-240

JACK R. BURNS, in his representative capacity as EXECUTOR OF THE ESTATE OF SELOM F. BURNS,

Plaintiff-Appellant,

VS.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only,

Defendant-Appellee.

No. 82-3501

D.C. NO. CV 82-239

PLAYTIME THEATRES, INC., a Washington Corporation,

Plaintiff-Appellant,

VS.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only, DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only, and JAMES SLOANE, Spokane City Attorney, in his representative capacity only, NORM MALENG, Prosecuting Attorney of King County in his representative capacity only,

Defendants-Appellees.

No. 82-3502

D.C. NO. CV 82-354

KUKIO BAY PROPERTIES, INC., a Washington corporation,

Plaintiff-Appellant,

vs.

NORM MALENG, Prosecuting Attorney of King County, in his representative capacity only,

Defendant-Appellee.

No. 82-3503

D.C. NO. CV 82-223

SPOKANE ARCADES, INC., a Washington corporation,

Plaintiff-Appellant,

vs.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only, DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only, and JAMES SLOANE, Spokane City Attorney, in his representative capacity only,

Defendants-Appellees.

No. 82-3504

D.C. NO. CV 82-283

THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON; MADRONA PUBLISHERS, INC., SUPERIOR PUBLISHING COMPANY; WASHINGTON LIBRARY ASSOCIATION; PACIFIC NORTHWEST BOOKSELLERS ASSOCIATION; MOTION PICTURE EXHIBITORS OF WASHINGTON, ALASKA, AND NORTHERN IDAHO; WASHINGTON, STATE COUNCIL OF

TEACHERS OF ENGLISH; WASHINGTON LIBRARY MEDIA ASSOCIATION; AND THE COMMUNITY COLLEGE LIBRARIAN AND MEDIA SPECIALISTS ASSOCIATION OF WASHINGTON,

Plaintiffs-Appellants,

VS.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only,

Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that James C. Sloane, in his official capacity as City Attorney for the City of Spokane, State of Washington, one of the defendant-appellees above named, hereby appeals to the Supreme Court of the United States from the April 6, 1984, order denying petition for rehearing of the 2-1 opinion, reversing the decision of the United States District Court for the Eastern District of Washington. The decision of the District Court held the challenged Washington State statute to be constitutional.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DATED this 27th day of June, 1984.

JAMES C. SLOANE
City Attorney

/s/ _____

RICHARD C. ROBINSON
Assistant City Attorney
Attorneys for Defendant-Appellee
5th Floor Municipal Building
W. 808 Spokane Falls Blvd.
Spokane, WA 99201-3326

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOS. 82-3441, 82-3442
& 82-3500 thru 82-3504

DC# 82-230 RJM

J-R DISTRIBUTORS, INC., et al.,

Plaintiffs-Appellants,

VS.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Defendants-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Jeffrey C. Sullivan, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington, and Fred Andrews, in his official capacity as City Attorney for the City of Yakima, State of Washington, defendants-appellees above named, hereby appeal to the Supreme Court of the United States from the April 6, 1984 order denying petition for rehearing of the 2-1 opinion, filed February 6, 1984, reversing the decision of the United States District Court for the Eastern District of Washington. The decision of the District Court held the challenged Washington State statute to be constitutional.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DATED this 3rd day of July, 1984.

/s/ _____

JEFFREY C. SULLIVAN
Yakima County Prosecuting Attorney
Attorney for Defendants/Appellees

(9) (8)

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No. 84-28 and 84-143
CONSOLIDATED

IN THE
SUPREME COURT
OF THE
UNITED STATES
OCTOBER TERM, 1984

No. 84-28

DONALD C. BROCKETT,

Appellant,

v.

SPOKANE ARCADES, INC., et al.,

Appellees.

No. 84-143

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et. al.,

Appellants,

v.

J-R DISTRIBUTORS, INC., et al.,

Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Amicus Curiae Brief of Lawrence J. Warren, As City Attorney for the City of Renton, Washington, In Support of the Appellants

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No. 84-28 and 84-143
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DONALD C. BROCKETT,
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APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Amicus Curiae Brief of Lawrence J. Warren, As City Attorney for the City of Renton, Washington, In Support of the Appellants

COMES NOW the City Attorney for the City of Renton, Washington, to file his Amicus Curiae Brief, pursuant to Rule 31.4 of the Rules of the United States Supreme Court, in support of the Appellants.

INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae City Attorney of the City of Renton, Washington, is in the jurisdictional aspects of the abstention question which has been raised in the Jurisdictional Statement of the Washington State Attorney General in No. 84-143. Although the arguments herein apply with equal force to the abstention question raised in the Jurisdictional Statement of Donald C. Brockett as Prosecuting Attorney for Spokane County in No. 84-28, (whose actions are also clothed with the attribute of state sovereignty), the applicability of the Eleventh Amendment principles espoused herein is clearer in No. 84-143 where the Attorney General of the State of Washington is the defendant, inasmuch as it was the "Attorney General" and not a "County Prosecuting Attorney" who was memorialized as the defendant in

this Court's landmark Eleventh Amendment opinion in Ex Parte Young, 209 U.S. 123 (1908).

The interest of this Amicus Curiae stems from the fact that the order of stay which the Court of Appeals granted to the Appellees J-R Distributors Inc., et al. on October 15, 1982 under Rule 6(i) of the Ninth Circuit Rules of Appellate Procedure, pending a resolution of their appeal, --- and in the face of the July 26, 1982 judgment of United States District Court Judge Robert J. McNichols in favor of Washington State Attorney General Eikenberry that H.B. 626 was constitutional, see Jurisdictional Statement in No. 84-143 at page B-1 et seq. and Joint Appendix at page 68 --- was used by Appellee Playtime Theatres, Inc., in the United States District Court for the Eastern District

of Washington one (1) year later[1/] as grounds for enjoining the City of Renton, in its civil public nuisance abatement action under H.B. 626 in the King County Superior Court, entitled City of Renton, a Municipal Corporation, et al. v. Playtime Theatres, Inc., a Washington Corporation, et al., No. 82-2-02344-2, from "enforcing or executing and/or threatening to enforce or execute the provisions of . . . House Bill 626 in whole or in part; except that nothing herein shall preclude the persons and entities so enjoined from maintaining a declaratory judgment action independently of any enforcement proceeding."

1/ A copy of the motion of Playtime Theatres, Inc. for a contempt order and papers in support thereof, filed on July 6, 1983, is attached as Appendix "A" to this brief. A copy of the memorandum of the City of Renton and affidavit of Lawrence J. Warren, in opposition to such motion, filed on July 7, 1983, is attached as Appendix "B" to this brief.

The October 28, 1983 injunction which United States District Judge Robert J. McNichols issued against the City of Renton[2/] interfered with the jurisdiction of the King County Superior Court and a contrary prior order of King County Superior Court Judge Robert M. Elston, entered on July 7, 1983,[3/] which rejected the same arguments and pre-trial Motion for Dismissal of Defendant Playtime Theatres, Inc. in the State case, and held that the City of Renton had stated a cause of action under H.B. 626 (R.C.W., Ch. 7.48A) which should go to trial.[4/]

2/ A copy of U.S. District Judge McNichols' October 28, 1983 Order is attached as Appendix "C" to this brief.

3/ A copy of King County Superior Court Judge Elston's order, entered on July 7, 1983, is attached as Appendix "D" to this brief.

4/ The pending City of Renton Public Nuisance Abatement action draws into focus the additional Younger-Huffman considerations and arguments presented in Parts IA and II of this brief.

SUMMARY OF ARGUMENT

I

The Attorney-General's request for federal abstention under Younger-Huffman raised the attribute of state sovereignty and Tenth and Eleventh Amendment questions as to whether the federal court's jurisdiction extended beyond its "jurisdiction to determine jurisdiction." National League of Cities v. Usery, 426 U.S. 833 (1972); Fry v. U.S., 421 U.S. 542 (1975); Hans v. Louisiana, 134 U.S. 1 (1890); Ex Parte Young, 209 U.S. 123 (1908); Watson v. Buck, 313 U.S. 387 (1941); Huffman v. Pursue Ltd., 420 U.S. 592 (1975).

Watson v. Buck, supra, requires a federal court to refrain from interfering with the sovereign right of a state court to interpret new legislation.

Hans v. Louisiana, supra, prevents a citizen from racing to the federal

courthouse and usurping the sovereign's right: (1) to have such legislation "interpreted" by the state court, and (2) to have unconstitutional portions "severed" by the state court if necessary.

Federal jurisdiction is dependent upon the "fiction" created in Ex Parte Young, supra, that the Attorney-General is violating the Constitution and, thus, the lawsuit is against a private individual rather than against the state in violation of the Eleventh Amendment. When the federal court entered its final judgment on July 26, 1982 that H.B. 626 was susceptible of a constitutional interpretation, the "fiction" of Ex Parte Young was dispelled and the jurisdiction of the federal court was exhausted. The federal court was under the constraints imposed by the Tenth and Eleventh Amendments and had no power to "stay" its

lack of jurisdiction and was required to dismiss the lawsuit.

I(A)

The federal courts erred in failing to consider the historical background of the Tenth and Eleventh Amendment problems which were considered and resolved in Ex Parte Young, supra, and the evolution in the law which has made the "fiction" in Ex Parte Young, supra, a factor which must be considered in every request for Younger-Huffman abstention. Under the trial facts herein, the federal courts may not ignore an Attorney-General's request for Younger-Huffman abstention.

A federal court may not "blame" the Attorney-General for failing to prosecute a state civil or criminal action under H.B. 626 when the Court itself has used its federal power to prevent such action from the time such new legislation first went into effect. Nor may a citizen

defeat the substantive right of a State under the Tenth and Eleventh Amendments by the "artful" procedural nuance of filing an action in the federal court after passage of the legislation and before the State has had an opportunity to bring such action in the state court.

The legislative history shows that Congress in 1910 enacted the Three-Judge Court Act to correct the intrusion of Ex Parte Young (1908) on state Tenth and Eleventh Amendment powers. When the Three-Judge Court procedures clogged the federal court dockets, Congress responded to this Court's request that the same be repeated under an assurance that the effect of the newly created Younger-Huffman abstention doctrine would provide an equivalent safeguard against such intrusions. The evolution in the law has made the Ex Parte Young fiction a factor which must be considered in every

request that the Younger-Huffman abstention doctrine be applied.

For the past nineteen (19) months, the State of Washington has been unconstitutionally deprived of its sovereign right to apply and interpret new legislation (H.B. 626).

II

The Ninth Circuit was required to abstain and dismiss the lawsuit under the principles and test espoused by this Court in Middlesex County Ethics Comm. v. Garden State Bar Assn., 457 U.S. 423 (1982) because of the "important state interest" involved.

Obscenity legislation qualifies as an "important state interest," U.S. v. 12-200 Foot Reels, 413 U.S. 123 (1973); Huffman v. Pursue Ltd., supra.

The federal plaintiffs had an adequate opportunity to raise the same constitutional challenges in a declaratory judgment in the state court.

There is no showing of bad faith, harassment or extraordinary circumstances which would make abstention inappropriate.

The lack of pendency of a state action does not defeat the rationale expressed in the Younger-Huffman line of cases and Middlesex County Ethics Comm. where: (1) state sovereignty has not been waived and the Attorney-General does not consent to federal jurisdiction; (2) the "important state interest" involved is newly enacted obscenity legislation; (3) the federal court has used its federal injunction power to prevent such state actions from being filed; (4) the plaintiff is barred from bringing the federal action by Hans v. Louisiana and; (5) in seeking standing in the federal court, is attempting to defeat the substantive right of state government by employing the "artful" procedural

nuance of "beating the Attorney-General to the Courthouse."

The federal court jurisdiction has unduly interfered with the legitimate activities of the state.

II(A)

Where Huffman v. Pursue Ltd., 420 U.S. 592 (1975); Juidice v. Vail, 430 U.S. 327 (1977); Trainor v. Hernandez, 431 U.S. 34 (1977); Moore v. Sims, 442 U.S. 415 (1979); Allen v. McCurry, 449 U.S. 90 (1980); and Younger v. Harris, 401 U.S. 37 (1971) apply, a federal court lacks "jurisdiction" and must dismiss the federal lawsuit. Allen v. McCurry, supra; Middlesex County Ethics Comm. v. Garden State Bar Assn., supra. In such cases, the federal court's jurisdiction is limited to that of deciding the question of jurisdiction.

The rationale in Middlesex County Ethics Comm., supra, which requires a

federal court to defer to a state court where an "important state interest" is concerned is based upon the following public policy considerations, all of which flow from the attribute of state sovereignty.

A federal court must accept the interpretation placed upon new state legislation, even though the State Court were to say that "black" is "white," and even though the federal court would not do so were it a federal statute, Kingsley Pictures Corp. v. Regents 360 U.S. 684 (1939).

Because of the doctrine of separation of powers, state courts are obliged to render a construction of new legislation which will arrive at a constitutional result. People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 55. In contrast, a federal court has no jurisdiction to authoritatively

interpret state legislation, U.S. v. 37 Photographs, 402 U.S. 363 (1971). Further, the question as to whether a state statute is severable is more properly a matter for the state court. Watson v. Buck, supra.

In Metromedia Inc. v. San Diego, 453 U.S. 490 (1981) this court recently confirmed the importance of the "statutory construction" factor by remanding the case back to the California Supreme Court for further statutory construction by the State Supreme Court, notwithstanding this court held the ordinance as originally interpreted by the State Supreme Court was unconstitutional on its face.

It is judicially inefficient to permit the federal system to entertain jurisdiction of civil rights cases of this sort and render judgments thereon which, in the final analysis under

Dombrowski v. Pfister, 380 U.S. 479 (1965) are and must be inconclusive, when the state court system is ready, willing, and able to perform that function and render a judgment which is final and conclusive.

III

The question here is really not abstention. In enacting 42 U.S.C. Section 1983, Congress never intended to create a cause of action or establish federal jurisdiction of a case such as this. Allen v. McCurry, 449 U.S. 90 (1980); Parratt v. Taylor, 451 U.S. 527 (1981).

In order to state a cause of action under 42 U.S.C. Section 1983, the plaintiff must plead and prove that the remedy for redressing the wrong is inadequate. The complaint must attack the state corrective procedure as well as the substantive wrong. Vickory v.

Walton, 721 F.2d 1062 (6th Cir. 1983); cert.den. 52 L.W. 3237 (Oct. 1, 1981). Appellees have neither alleged nor proven such a cause of action and the lawsuit should be dismissed for failing to state a claim upon which relief can be based.

ARGUMENT

I

THE TRIAL COURT'S FINAL JUDGMENT ON JULY 26, 1982 THAT H.B. 626 WAS CONSTITUTIONAL DISPELLED THE FICTION OF EX PARTE YOUNG AND EXHAUSTED THE JURISDICTION OF THE TRIAL COURT. THE TENTH AND ELEVENTH AMENDMENTS PRECLUDED THE FEDERAL COURT FROM THEREAFTER CONSIDERING THE MERITS OF THE CHALLENGES TO H.B. 626 AND FROM GRANTING A STAY UNDER RULE 6(i)

Amicus Curiae contends that where, as here: (1) a citizen attempts to invoke the equity jurisdiction of the federal courts against the Attorney General of a State in a "race to the courthouse," and (2) the Attorney General does not waive the attribute of state sovereignty, and does not consent to have the challenge to the "important state interest" tried in the federal courts, the Tenth Amendment, as expressed in National League of Cities v. Usery, 426 U.S. 833 at 842-846 (1972) and Fry v. United States, 421 U.S. 542 at 547 fn. 7

(1975), and the Eleventh Amendment as expressed in Hans v. Louisiana, 134 U.S. 1 (1890) and Ex Parte Young, 209 U.S. 123 (1908), preclude the general jurisdiction of the federal judicial system from attaching to such federal lawsuit, and require the trial court to determine initially, whether or not it has jurisdiction to act on the matter under the fiction [5/] engaged in by this Court in Ex Parte Young, supra, and the policy limitations expressed by this Court in Watson v. Buck, 313 U.S. 387 at 401-402 (1941). Watson v. Buck holds that a state statute, which contains a severability clause, must be "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in

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5/ See Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power (1980) at 154-159.

whatever manner and against whomever an effort might be made to apply it. . . ." before a federal court can interfere with the right of a state court to interpret such legislation.

Amicus Curiae further contends that, under the unusual trial facts herein, when U.S. District Court Judge Robert J. McNichols entered his final judgment on July 26, 1982 that H.B. 626 was susceptible of a constitutional interpretation, the fiction of Ex Parte Young, supra, was dispelled, and the jurisdiction of the United States District Court was exhausted. See Village of Hoffman Estate v. Flipside, 455 U.S. 489 at fn. 5 (1982). Under that final judgment, any actions taken by the Attorney General thereafter, pursuant to the statute, would be the lawful acts of

a "sovereign."[6/] At that juncture, the U.S. District Court, under both the Tenth and Eleventh Amendments, was without jurisdiction to grant further equitable relief under Rule 6(i) and was

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6/ See Pennhurst State School & Hosp. v. Halderman, ___ U.S. ___, 79 L.Ed.2d 67, 104 S.Ct. ___ (January 23, 1984) where a majority of this court in commenting on the rationale of Ex Parte Young, stated at p. 79:

> "The theory of the case was that an unconstitutional enactment is 'void' and therefore does not 'impart to (the officer) any immunity from responsibility to the supreme authority of the United States. . . .'"

and at page 81:

> "As discussed above, the injunction in Young was justified, notwithstanding the obvious impact on the State itself, on the view that sovereign immunity does not apply because an official who acts unconstitutionally is 'stripped of his official or representative character.' Young, 209 U.S. at 160, 52 L.Ed. 714, 28 S.Ct. 441. This rationale, of course, created the 'well-recognized irony' that an official's unconstitutional conduct constitutes state action under the Fourteen Amendment but not the

required to dismiss the lawsuit. See Justice Stevens' plurality opinion in Florida Department of State v. Treasure Salvors, Inc., etc., 458 U.S. 670 at 682:

> "The Court did not have power, however, to adjudicate the State's interest in the property without the State's consent."

and Justice White's concurring and dissenting opinion therein, for four additional justices, at the footnote on page 703. Inasmuch as neither the United States District Court nor the United States Court of Appeals had subject matter jurisdiction which would permit those Courts to consider Appellees' challenges to the various provisions of H.B. 626, the judgment of the Ninth Circuit Court of Appeals must be reversed

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Eleventh Amendment. Florida Department of State v. Treasure Salvors, Inc., 458 U.S. 670, 685, 73 L.Ed.2d 1057, 102 S.Ct. 3304 (1982) (opinion of Stevens, J.)."

and the case remanded with instructions to dismiss the Complaint for lack of jurisdiction over the subject matter. See Huffman v. Pursue Ltd., 420 U.S. 592 at 612 (1975) discussed infra at page 24. Those questions must be presented to the State Court for resolution. In Pennhurst, supra, this Court observed:

> ". . . it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." (our emphasis).

Is there any significant difference where a federal court "preempts" or arrogates the right of a state court to instruct the state officials on how the language of a statute is to be interpreted and what the statute means, as was done in the federal courts below?

I(A) The Court of Appeals Erred In Failing To Consider The Historical Background of the Tenth and Eleventh Amendment Problems Which Were Considered And Resolved In Ex Parte

Young, And The Evolution In The Law Which Has Made the Ex Parte Young "Fiction" A Factor Which Must Be Considered In Every Application Of The Younger-Huffman Abstention Doctrine. The Federal Court May Not Ignore The Attorney-General's Request For Younger-Huffman Abstention Under The Trial Facts Herein.

Amicus Curiae's analysis in Part I, above, does not depend upon the Younger-Huffman abstention doctrine. Under the Part I analysis, the Trial Court had no power to stay its judgment of dismissal on July 26th, 1982. Having found and determined on July 2, 1982 that H.B. 626 was constitutional, and having entered a Judgment of Dismissal to that effect on July 26, 1982, the Trial Court had exhausted its jurisdiction (ie., jurisdiction to determine its jurisdiction) and the further grant of a stay as to its own judgment, pending Appellees' application to the Court of Appeals for a stay pursuant to Rule 6(i),

was ineffective for that purpose. For the same reason, the Ninth Circuit had no power to grant a stay pursuant to Rule 6(i), and its order to that effect of October 15, 1982 (81 days later) was similarly ineffective. Because of the Tenth and Eleventh Amendment considerations, Rule 6(i) of the Ninth Circuit Rules of Appellate Procedure cannot constitutionally be applied by the Ninth Circuit to the facts of this case.

With regard to the Attorney-General's request for Younger-Huffman abstention, Amicus Curiae submits that both the Trial Court and the Court of Appeals erred in failing to consider in depth: (1) the Tenth and Eleventh Amendments conflicts which the Complaints on file herein present, in relation to the "fiction" which this Court created in Ex Parte Young, supra, and (2) the evolution in the law which has taken

place since Ex Parte Young was decided.

In his Memorandum and Order which granted a preliminary injunction on April 13, 1982 (Joint Appendix at page 36), U.S. District Judge Robert J. McNichols merely noted as to the Younger-Huffman abstention issue:

> "Arguments presented in support of abstention are not convincing given the fact that no actions of either a criminal or civil nature are currently pending against the plaintiff. See 414 Theater Corp. v. Murphy, 499 F.2d 1155, 1160-61 (2d Cir. 1974). Further, a recent Supreme Court decision suggests that an action brought pursuant to 42 U.S.C. Section 1983 may be entertained by a federal court on its own merits independent of the abstention doctrine set forth in Younger v. Harris, 401 U.S. 37 (1971). See generally, Wooley v. Maynard, 430 U.S. 705 (1977).

Subsequently, in his Memorandum Decision on July 2, 1982, which held H.B. 626 to be constitutional, in replying to the Attorney-General's request that he abstain (so that the state court might be permitted to instruct the Washington

State Attorney-General and state law enforcement officials on how the language of the statute was to be interpreted), U.S. District Judge McNichols cursorily held (Jurisdictional Statement at page B-4):

> "Jurisdiction is founded on the Federal Question Statute, 28 U.S.C. Section 1331. It should be noted at the outset that defendants' arguments in favor of general abstention are rejected. Where a claim is predicated upon alleged abridgement of First Amendment rights, a federal court should abstain only in the face of special circumstances. Zwickler v. Koota, 389 U.S. 241, 252, 88 S.Ct. 391, 397, 19 L.Ed. 444 (1967). The extenuating factors referenced in that decision are not present here."

While the Ninth Circuit Court of Appeals' opinion on February 6, 1984 allocated a page and a half to its general discussion of the abstention issue (see Jurisdictional Statement at pages A-6 and A-7), it refused to consider the rationale of the Younger-Huffman line of cases and the attending

Tenth and Eleventh Amendment conflicts merely because "no one has been prosecuted and no civil actions have been filed". See Jurisdictional Statement at the last paragraph of footnote 6 on page A-8 reading:

> "Abstention may also be appropriate in certain instances when a federal suit seeks to enjoin a pending or ongoing state proceeding in which federal claims could be adjudicated competently. See, e.g., Younger v. Harris, 401 U.S. 39, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); Moore v. Sims, 442 U.S. 415, 423, 425, 99 S.Ct. 2371, 2377, 2378, 60 L.Ed.2d 994 (1979); L.H. v. Jamieson, 643 F.2d 1351, 1352 (9th Cir. 1981). It is not necessary to decide whether this is the type of case in which Younger abstention might otherwise be appropriate because as the State notes, '(n)o one has been prosecuted [and] no civil actions have been filed' pursuant to House Bill 626. See supra, 725 F.2d at 487.

The Ninth Circuit's analysis of the Attorney-General's request for Younger-Huffman was faulty, however, in failing to weight and consider two additional important historical facts: (1) the

federal court's preliminary injunction on April 13, 1982 and subsequent stays on April 26, 1982 and October 15, 1982 had prevented the filing of such state lawsuits by law enforcement officials, and (2) the event which, in the Court of Appeals' analysis, made Younger-Huffman irrelevant was the fact that the federal plaintiffs had beaten law enforcement in their "race to the Courthouse." The great vice and error in the Ninth Circuit's analysis is its inherent holding that individuals may defeat the substantive Tenth and Eleventh Amendment rights of sovereign governments to deal with "important state interests" in the State Courts by simply employing "artful" procedural nuances, as here, by attacking the State legislation in the federal courts after passage of the legislation and before the Attorney-General has had an opportunity to present a case to the

State Court!

Amicus Curiae submits that the above rulings of the U.S. District Court and the U.S. Court of Appeals for the Ninth Circuit that a federal court may deny an Attorney-General's request for Younger-Huffman abstention under these circumstances ignore the historical background of the Tenth and Eleventh Amendment problems which were presented and resolved in Ex Parte Young, and the evolution of the law which followed and has made the Ex Parte Young "fiction" a factor which must be considered in every application of the recently adopted Younger-Huffman abstention doctrine.

The historical background of the Younger-Huffman abstention doctrine is traced by Stern and Gressman in their work "Supreme Court Practice," Fifth Edition at pages 99 et seq.. In 1908, this Court, in its landmark decision in

Ex Parte Young, 209 U.S. 123 (1908) held that State officials could be enjoined by Federal Courts from enforcing unconstitutional state statutes, notwithstanding the Eleventh Amendment objection, through this Court's creation of a "fiction" in that case. Parenthetically, it should be observed that Ex Parte Young does not authorize a federal court to enjoin state officials from enforcing constitutional state statutes, nor does its rationale and the evolution of that rationale permit that result. In 1910, as a response to this intrusion of Ex Parte Young on state powers, Congress enacted the Three-Judge Court Act (Act of June 18, 1910, Ch. 309, Section 17, 36 Stat. 577) which prohibited a single Federal district judge (as in this case) from issuing interlocutory injunctions against allegedly unconstitutional State statutes and required that cases seeking such

injunctive relief be heard by a district court made up of three judges. The Act also contained a provision for direct appeal to the Supreme Court in the belief that this would provide speedy review of those cases. In 1976, as the number of three-judge court cases and direct appeals dramatically increased and clogged this Court's docket, Congress responded to this Court's supplications for relief from the workload by repealing the three-judge requirement - but only after its fears were dissipated by an assurance that the effect of the abstention doctrines established in Younger v. Harris, 401 U.S. 37 (1971) and Huffman v. Pursue Ltd., 420 U.S. 592 (1975) has been such that "the rationale that gave life to the three-judge court in 1910 has all but disappeared." Report of the Senate Committee on the Judiciary (S.Rep. No. 94-204, 94th Cong., 1st

Sess., 1975, p. 2). The rulings of the federal court below, which now ignore the Ex Parte Young principles of law which are a part and parcel of the Younger-Huffman line of cases, fly in the face of the assurance which was given when the safeguards in the three-judge court procedure were surrendered in Congress by the States. Amicus Curiae submits that, in view of these historical facts and evolution of the law, the Ex Parte Young fiction has been made a factor which must be considered in every application of the Younger-Huffman abstention doctrine.[7/]

7/ See, generally, Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power (1980) at pages 154-159 and Section V "Decyphering Congressional Intent" at page 163 et seq. At page 157 the author notes:

> "The danger of any legal fiction is that those applying it will forget the purpose it was designed to serve. This has proven true in the application of the doctrine of Ex Parte Young.

Although the federal system was aware that the Washington State Legislature deemed H.B. 626 to be sufficiently important that it should go into effect immediately, as an emergency measure on April 1, 1982 (See the "Conclusion" of U.S. District Judge McNichols' Memorandum Decision, in the Jurisdictional Statement at page B-16), that attribute of state sovereignty has been effectively denied the State of Washington for the past 19 months. Amicus Curiae submits that the Tenth and Eleventh Amendment problems dealing with state sovereignty and state and federal relationships that gave life to the Ex Parte Young "fiction", the three-judge court creation in 1910, and its repeal by Congress in 1976 under the assurance that the Younger-Huffman abstention doctrine would alleviate the state-federal conflict, are present in this appeal in the

application of the Younger-Huffman abstention doctrine. The evolution of the law subsequent to Ex Parte Young requires that the federal courts abstain under Younger-Huffman, as requested by the Attorney-General, and that the Judgment of the Ninth Circuit Court of Appeal be reversed.

II

UNDER THE GENERAL PRINCIPLES ESPOUSED IN MIDDLESEX COUNTY ETHICS COMMITTEE v. GARDEN STATE BAR ASSOCIATION AND OTHER ABSTENTION CASES, THE NINTH CIRCUIT WAS REQUIRED TO ABSTAIN AND DISMISS THE CIVIL RIGHTS ACTION BECAUSE OF THE "IMPORTANT STATE INTEREST" INVOLVED.

In Middlesex County Ethics Committee, etc. v. Garden State Bar Assn., et al., 457 U.S. 423 (June 21, 1982), disciplinary proceedings were instituted by the local committee of the New Jersey disciplinary system against an attorney based upon an allegation of unethical conduct. Upon filing of a formal statement of charges, the respondent refused to answer, but instead filed suit in the United States District Court contending that the disciplinary rules violated his First Amendment right of free speech. The District Court granted the Bar Association's Motion to Dismiss based on Younger v. Harris, 401 U.S. 37

(1971), but the Court of Appeals reversed. On appeal, the majority of this Court held that abstention was mandated, under the general principles previously expressed by this Court, "when important state interests are involved." See Middlesex County Ethics Committee, supra, at page 124 where this Court noted:

> "The policies underlying Younger are fully applicable to noncriminal judicial proceedings when important state interests are involved. Moore v. Sims, 442 U.S. 415, 423, 60 L.Ed.2d 994, 99 S.Ct. 2371 (1979); Huffman v. Pursue, Ltd., 420 U.S. 592, 604-605, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975). The importance of the the state interest may be demonstrated by the fact that the non-criminal proceedings bear a close relationship to proceedings criminal in nature, as in Huffman, supra. Proceedings necessary for the vindication of important state policies or for the functioning of the state judicial system also evidence the state's substantial interest in the litigation. Trainor v. Hernandez, 431 U.S. 434, 52 L.Ed.2d 486, 97 S.Ct. 1911 (1977); Juidice v. Vail, 430 U.S. 327, 51 L.Ed. 376, 97 S.Ct. 1211 (1977).

> Where vital State interests are involved, a federal court should abstain 'unless state law clearly bars the interposition of the constitutional claims.' Moore, supra, at 426, 60 L.Ed.2d 994, 99 S.Ct. 2371. '[T]he . . . pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims. . . .' Id., at 430, 60 L.Ed.2d 994, 99 S.Ct. 2371. See also, Gibson v. Berryhill, 411 U.S. 564, 36 L.Ed.2d 488, 93 S.Ct. 1689 (1973)."

Amicus Curiae contends that the Middlesex County Ethics Committee case at pages 124-126, enunciates a test for Federal Court abstention in criminal and non-criminal proceedings involving "important state interests," which controlled the discretion of the Ninth Circuit below and required it to dismiss the federal action herein when the Attorney General refused to waive the attribute of state sovereignty and consent to have the "important state interest" tried in the federal court.

Simply stated, the Middlesex County

Ethics Committee test is:

1. Is a State action pending?

2. Do the proceedings implicate important state interests (i.e., are important State policy questions involved?)

3. Can the constitutional challenges be raised in the state court?

4. Is there a showing of bad faith, harassment or some other extraordinary circumstance which would make abstention inappropriate?

The record herein demonstrates that except for the fact that Appellee's "race to the courtroom" prevented the initiation of a state court action - a factor which does not affect the underlying rationale or alter the end result[8/] - the Middlesex County Ethics Committee test has been satisfied and abstention is mandated:

8/ See Part IA, supra, at page 27.

1. Although a State Action is not pending, the Tenth and Eleventh Amendment principles of Middlesex County still control. The attribute of state sovereignty has not been waived, and the Attorney General has not consented to have the "important state interest" tried in the federal courts, and stands ready to perform his duty in the State Court when he is afforded the opportunity.

2. The federal court proceedings implicated important state interests (obscenity legislation). This court has previously expressed its attitude toward state obscenity legislation. See United States v. 12-200 Foot Reels, 413 U.S. 123 at 130, fn. 7:

> "We further note that . . . we must leave to state courts the construction of state legislation. . . ." (our emphasis).

See, also, Paris Adult Theatre v. Slaton, 413 U.S. 49 at 57:

> ". . . we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity. . . .";

and at page 59:

> "there is a 'right of the . . . states to maintain a decent society. . . ."

It would seem clear therefore that obscenity legislation qualifies as an "important state interest" within the meaning of Middlesex County Ethics Committee, supra. See, also, Huffman v. Pursue Ltd., 420 U.S. 592 (1975) discussed herein at pages __ et seq.

As this Court noted in the Middlesex County case at page 125, footnote 12:

> ". . . whether the proceeding is 'labeled civil, quasi-criminal or criminal in nature,' the salient fact is whether federal-court interference would unduly interfere with the legitimate activities of the state. Id., at 335-336." (our emphasis).

There can be no doubt that the federal court has "unduly interfere(d)

with the legitimate activities of the state" herein. See "Interest of Amicus Curiae," supra, at pages 2-5 and Appendix "A" and "B" to this brief.

3. The federal plaintiffs had an adequate opportunity to raise the same constitutional challenges in a declaratory judgment state court proceedings. See "Defendant's Answer to Plaintiff's Complaint" at Point I "Jurisdiction" at Joint Appendix, page 44.

4. There is no showing of bad faith, harassment, or extraordinary circumstance which would make abstention inappropriate.

It was a usurpation of jurisdiction, for the Ninth Circuit to fail to abstain from the exercise of jurisdiction in this matter, in light of the Attorney General's refusal to waive the attribute of state sovereignty and consent to try

the "important state interest" in the federal courts.

II(A). In Applying The Middlesex County Ethics Comm. Abstention Principles The Federal Court Must Abstain If The Statute Is Susceptible Of A Constitutional Construction In The State Court. It May Only "Assume Jurisdiction" Where The Challenged Statute Is "Flagrantly And Patently Violative Of Express Constitutional Prohibitions In Every Clause, Sentence And Paragraph And In Whatever Manner And Against Whomever An Effort Might Be Made To Apply It."

Huffman v. Pursue Ltd., 420 U.S. 592 (1975), considered the same "important state interest" that is involved herein. In Huffman, this Court held that the first three parts of the Middlesex County Ethics Committee test had been satisfied. The Huffman case, however, was not ordered dismissed as was done in Middlesex County, but was remanded to the U.S. District Court to determine whether the fourth part of the test had been

satisfied before the court could "assume jurisdiction"; that is at page 497:

> "whether . . . the District Court may assume jurisdiction under an exception to the (Younger) policy against federal judicial interference with state court proceedings of this kind." (our emphasis).

During the 1976 October Term, however, Huffman v. Pursue Ltd., supra, was further applied by this Court in other civil cases: Juidice v. Vail, 430 U.S. 327 (Mar. 22, 1977) and Trainor v. Hernandez, 431 U.S. 434 (May 31, 1977) and distinguished in Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977). In his dissent in Juidice, Justice Stewart noted a significant difference between Pullman abstention and Younger-Huffman abstention, at page 348:

> ". . . Both types of 'abstention' of course, serve the common goal of judicial restraint as a means of avoiding undue federal interference with state goals and functions. But there is a significant difference in result between

> the two. Under Pullman abstention, the federal court may retain jurisdiction pending state-court interpretation of an ambiguous statute, while under Younger it may not." (our emphasis).

See also Trainor v. Hernandez,[9/] 431 U.S. 434, 445 (May 31, 1977) and Moore v. Sims, 442 U.S. 415, 430 (June 11, 1979), citing the Trainor v. Hernandez text noted above, in holding that the principles of Younger-Huffman, acted as a bar.

9/ In Trainor v. Hernandez, supra, the Court held that where Huffman v. Pursue Ltd. applies, pendency of the state court action called for dismissal of the complaint.

> ". . . For a federal court to proceed with its case rather than to remit appellees to their remedies in a pending state enforcement suit would confront the State with a choice of engaging in duplicative litigation, thereby risking a temporary federal injunction, or of interrupting its enforcement proceedings pending decision of the federal court at some unknown time in the future. It would also foreclose the opportunity of the state court to construe the challenged statute in

While the language of this Court in the above cases does not specifically hold that federal "jurisdiction" is in question, due to the interaction of Tenth

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the face of the actual federal constitutional challenges that would also be pending for decision before it, a privilege not wholly shared by the federal courts. Of course, in the case before us the state statute was invalidated and a federal injunction prohibited state officers from using or enforcing the attachment statute for any purpose. The eviscerating impact on many state enforcement actions is readily apparent. This disruption of suits by the State in its sovereign capacity, when combined with the negative reflection on the State's ability to adjudicate federal claims that occurs whenever a federal court enjoins a pending state proceeding, leads us to the conclusion that the interests of comity and federalism on which Younger and Samuels v. Mackell primarily rest apply in full force here. The pendency of the state court action called for restraint by the federal court and for the dismissal of appellees' complaint unless extraordinary circumstances were present warranting federal interference or unless their state remedies were inadequate to litigate their federal due process claim." (our emphasis).

Amendment and Eleventh Amendment principles; if that were not at the very core of the problem, what would be the reason for distinguishing between Pullman abstention and Younger-Huffman abstention?

That a federal court lacks "jurisdiction" in matters involving state sovereignty, where the trial facts show that the constitutional claim can be raised and fully litigated in a civil action in the state court, finds support in the rationale expressed in Allen v. McCurry, 449 U.S. 90 (Dec. 9, 1980). In Allen et al. v. McCurry, supra, a majority of this Court had occasion to rethink the legislative intent which authorized federal jurisdiction in Civil Rights cases, under the authority of 42 U.S.C. Section 1983. In that decision, the majority made it clear that, except where the claim was made that a state statute was totally

unconstitutional on its face, it was not intended by Congress that the federal courts should have jurisdiction over a 42 U.S.C. Section 1983 federal cause of action where the state courts were available, as here, to allow full litigation of the constitutional claim. See Allen et al. v. McCurry, supra, at page 317:

> ". . . To the extent that it did intend to change the balance of power over federal questions between the state and federal courts, the 42d Congress was acting in a way thoroughly consistent with the doctrines of preclusion. In reviewing the legislative history of section 1983 in Monroe v. Pape, supra, the Court inferred that Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. 365 U.S. at 173-174. In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights. Id., at 176." (our emphasis).

Under Allen et al. v. McCurry, supra, Appellees can no longer claim that every litigant asserting a 42 U.S.C. Section 1983 federal right is entitled to one unencumbered opportunity to litigate that federal right in a federal district court except where their claim is that the statute in question meets the test of Watson v. Buck, supra, or bad faith and harassment are present. See Allen, et al. v. McCurry, 449 U.S. 90 at 103:

> "The actual basis of the Court of Appeals' holding appears to be a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. But the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress. And no such authority is to be found in Section 1983 itself." (our emphasis).

and at 105:

> "The only other conceivable basis for finding a universal right to litigate a federal claim in a federal district court is hardly a legal basis at all, but rather a general distrust of the capacity of the state courts to render correct decisions on constitutional issues. It is ironic that Stone v. Powell provided the occasion for the expression of such an attitude in the present litigation, in view of this Court's emphatic reaffirmation in that case of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so. 428 U.S. at 493-494, n. 35, 49 L.Ed.2d 1067, 96 S.Ct. 3037; see Robb v. Connolly, 111 U.S. 624, 637, 28 L.Ed.2d 542, 4 S.Ct. 544 (Harlan, J.).

In remanding Huffman to determine whether the District Court "may assume jurisdiction," this Court defined the "jurisdictional" boundary line of that Younger "exception" at page 496 as:

> "Younger, and its civil counterpart which we apply today, do, of course, allow intervention in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith or where the challenged statute is 'flagrantly and patently violative of

express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' As we have noted, the District Court in this case did not rule on the Younger issue, and thus apparently has not considered whether its intervention was justified by one of these narrow exceptions. . . ." (our emphasis).

In view of Huffman, supra, as explicated in this Court's recent opinion in Middlesex County Ethics Committee v. Garden State Bar Assn., supra, it seems clear that where the principles of Middlesex apply and if the state statute is susceptible of a constitutional construction in the state court, the federal court must dismiss the federal action and permit the State Court to interpret the statute.

The above rule of law, first voiced by this Court in Buck v. Watson, 313 U.S. at 401-402 and cited with approval in Younger v. Harris, 401 U.S. 37 at 53-54 (1971) and in Huffman v. Pursue Ltd., at

p. 60, fn. 14, was correctly expressed by the United States District Court, M.D. Florida, Tampa Division in Stecher v. Askew, 432 F.Supp. 997 at 999 (1977):

> "While, as a general rule, a State Supreme Court may construe a statute which appears unconstitutional on its face in such a way as to render its application constitutional, see e.g., Wainwright v. Stone, 414 U.S. 21 (94 S.Ct. 190, 38 L.Ed.2d 179) (1973), there may be cases in which such a construction, even though attempted, may be impossible. Under the facts alleged in the complaint, the plaintiff has standing to assert that this statute presents such a situation. The plaintiff has standing as to this issue: to wit, whether the statute is unconstitutional on its face and could not be rendered constitutional by any decision of the Florida Supreme Court." (our emphasis).

In seeking intervention by the federal court, Plaintiffs must successfully demonstrate that no further interpretation could bring H.B. 626 under question within the confines of the protections insured by the Constitution. If there is any saving interpretation which the state

court could make, plaintiffs must demonstrate that the state courts will not so construe it. As the Court said in Stecher, supra, at page 999:

> "For the plaintiff to succeed in this Court, he must successfully demonstrate that no further interpretation could bring this statute within the confines of the tests set out in Chaplinsky. In subsequent proceedings under this statute, however, there is absolutely no obstacle to the Florida courts' further defining the words "Necessarily incite a breach of the peace' which were incorporated into this statute by State v. Mayhew, 288 So.2d 243 (Fla. 1973), as meaning 'words likely to cause an average addressee to fight.' Such construction would save the statute, and the plaintiff cannot demonstrate that the Florida courts will not so construe it." (our emphasis).

While it is true that a state defendant may consent to have the federal court make that determination, see Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 480, that is not the case here. Appellants Washington State Attorney General et al. have continuously

resisted intervention by the Ninth Circuit and have requested both the trial court and the Court of Appeals to abstain.

Without doubt, the U.S. District Court has jurisdiction in such cases to decide the question of jurisdiction. U.S. v. United Mine Workers of America, 330 U.S. 258 (1974). Where, however, a state statute involving an "important state interest" is susceptible of a construction which will render the statute constitutional and the state law enforcement officer refuses to waive the attribute of state sovereignty and consent to have the "important state interest" tried in the federal courts, under Middlesex County Ethics Committee, supra, the federal court must abstain and must allow the matter to be returned to the state court system for an authoritative construction by the state court.

One of the principle reasons why this result is mandated is the fact that a federal court lacks jurisdiction to authoritatively construe state legislation, U.S. v. Thirty-Seven Photographs, 402 U.S. 363 (1971), a task which is routinely performed by state courts.

Further, were the Washington State Supreme Court to say that "black" is "white" or that "prurient interest" has an entirely different meaning that that ascribed to it by the Ninth Circuit Court of Appeals herein, the federal system on an appeal from that judgment must accept that interpretation and test the constitutionality of the state statute on that basis. Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688 (1959).

The rationale in Middlesex County Ethics Committee, supra, which requires a federal court to defer to the state courts where an "important state inter-

est" is concerned, is grounded upon several important policy considerations all of which are an integral part of the attribute of state sovereignty.

In the first place, there is a marked difference in the way in which the state and federal courts approach the constitutional issue regarding legislation. Largely because of the doctrine of separation of powers, the rule has evolved that state courts are obliged to render a construction of state legislation which will arrive at a constitutional result. In People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 55 at 56, the California Supreme Court noted, at page 336:

> "Furthermore, the United States Supreme Court recently emphasized within the foregoing context that courts have an obligation to construe statutes in such a way as to avoid serious constitutional doubts. . . ." (our emphasis).

and, at page 338:

> "We are obliged to construe and interpret legislation in a manner which will uphold its validity. (Citations). Thus, the courts have held that provision for a prior adversary hearing may be implied by law in otherwise silent statutory provisions."

Because federal courts do not bear the same relationship to state legislatures and don't function in the same manner as regards state legislation, see U.S. v. 37 Photographs, supra, the end result is certain to differ.

The question as to whether defective federal and state legislation may be "saved" by statutory construction or by severance of the defective portion presents important public policy matters for both federal and state governments. See Tilton v. Richardson, 403 U.S. 672 at 684, where Chief Justice Burger noted:

> "The cardinal principle of statutory construction is to save and not destroy."

The question, however, as to whether a

state statute is severable is more properly a matter for the state court. See Watson v. Buck, supra. In a recent statement confirming the importance of the "statutory construction" factor and the right of state courts to interpret city ordinances, this Court in Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (involving a direct appeal of a city ordinance after a state court decision by the California Supreme Court upholding the ordinance on its face), remanded the case back to the California Supreme Court for further statutory construction by the state court, notwithstanding it held the ordinance to be unconstitutional on its face. See in this regard, Justice White's opinion announcing the judgment of the Court at page 823, fn. 26, wherein he addresses the issue of severability and the responsibility and right of state courts in

that regard:

> "Although the ordinance contains a severability clause, determining the meaning and application of that clause are properly responsibilities of the state courts. See Dombrowski v. Pfister, 380 U.S. 479, 497, 14 L.Ed.2d 22, 85 S.Ct. 1116 (1965) ('The record suffices . . . to permit this Court to hold that, without the benefit of limiting construction, the statutory provisions on which the indictments are founded are void on their face; until an acceptable limiting construction is obtained, the provisions cannot be applied.'); Liggitt Co. v. Lee, 288 U.S. 517, 541, 77 L.Ed.2d 929, 53 S.Ct. 481, 85 A.L.R. 699 (1933) ('The operation of this [severability clause] consequent on our decision is a matter of state law. While we have jurisdiction of the issue, we deem it appropriate that we should leave the determination of the question to the state court.'); Dorchy v. Kansas, 264 U.S. 286, 291, 68 L.Ed. 686, 44 S.Ct. 323 ('In cases coming from the state courts, this Court, in the absence of a controlling state decision may, in passing upon the claim under the federal law, decide, also the question of severability. But it is not obliged to do so. The situation may be such as to make it appropriate to leave the determination of the question to that state court.') This rule is reflected in the different approaches this Court has taken to statutory construction of

> federal and state statutes infringing on protected speech. Compare United States v. Thirty-Seven Photographs, 402 U.S. 363, 28 L.Ed.2d 822, 91 S.Ct. 1400 (1971), with Freedman v. Maryland, 380 U.S. 51, 60 L.Ed.2d 649, 85 S.Ct. 734 (1965). Since our judgment is based essentially on the inclusion of non-commercial speech within the prohibitions of the ordinance, the California courts may sustain the ordinance by limiting its reach to commercial speech, assuming the ordinance is susceptable to this treatment." (our emphasis).

The dilemma is how this procedural step is to be accomplished where, as here, the federal court arrogates to itself that power and interferes with the functions of the state court system in that regard. 10/

10/ A recent decision of this Court involving new legislation has contributed to the general perception that abstention is not required in such cases. Spokane Arcades, Inc. v. Brockett, 631 F.2d 135 (9th Cir. 1980), affirmed summarily in Brockett, etc. v. Spokane Arcades, Inc., et al., 454 U.S. 1022 (1981).

The judicial inefficiency of continuing to permit the federal system to entertain jurisdiction of civil rights cases of this sort and render judgments thereon which, in the final analysis under Dombrowski, are and must be inconclusive, when the state court system is ready, willing and able to consider the identical issues and render a judgment thereon, which will be binding and conclusive, is obvious. 11/

11/ In a speech prepared for delivery at New York University on November 18, 1982, Chief Justice Warren E. Burger has warned that if some drastic changes are not made, state and federal court systems could "literally break down before the end of the century" because of the burden of work being placed upon them:

> "'If every case in the Supreme Court is to continue receiving individual attention of justices, as has been the tradition, the caseload cannot continue at the present rate,' Burger said. 'It is not just a matter of maintaining the present caseload. That load must be reduced.'"

See Los Angeles Daily Law Journal article of November 19, 1982.

III

APPELLEES' CIVIL RIGHTS ACTION FAILS TO STATE A CLAIM UPON WHICH FEDERAL RELIEF CAN BE BASED.

Under the rationale expressed in Allen v. McCurry, 449 U.S. 90 (1980), and Parratt v. Taylor, 451 U.S. 527 (1981), Congress intended to create a cause of action and establish federal jurisdiction under 42 U.S.C. Section 1983 only where one of the following three circumstances is shown to exist:

(1) The State substantive law is facially and totally unconstitutional;

(2) The State procedural law is inadequate to allow full litigation of a constitutional claim; or

(3) The State procedural law, though adequate in theory is inadequate in practice.

In this case, none of the foregoing circumstances apply and the procedural law of the State of Washington is entirely adequate to allow full

litigation of all constitutional claims.

Amicus Curiae submits that, as noted by District Judge Young's analysis of Parratt, supra, in Juncker v. Tinney III, 549 F.Supp. 574, the question is really not "abstention" and whether the Plaintiff has exhausted his state judicial remedies, but rather whether the Plaintiff has stated a claim upon which relief can be based; at page 578:

> "The court argues that if Parratt were applied to cases involving liberty and life interests, this would relegate to the state courts so large a portion of section 1983 cases as to constitute in effect an exhaustion requirement, which the courts have consistently rejected under section 1983. This is simply incorrect; there is no connection between an exhaustion requirement and the policy of applying Parratt to all section 1983 cases. The argument for applying Parratt to liberty and life interest (and thus for sending many purported section 1983 cases to state court) is based not upon principles of comity but upon the language of the Fourteenth Amendment and upon the concept that in certain situations a complaint fails to state a claim under the Fourteenth

> Amendment because the plaintiff has not been deprived of a constitutional right without due process of law. Proof of this difference lies in the different results. Under an exhaustion requirement, a plaintiff may sue in federal court after he has exhausted his state remedies. Under the Parratt analysis, if a plaintiff fails to state a claim under section 1983, he has no cause of action in federal court, and may sue only in state court." (our emphasis).

Very recently a majority of the Justices on a panel of the Sixth Circuit in Vickory v. Walton, 721 F.2d 1062 (CA 6th, Nov. 30, 1983), petition for a writ of certiorari denied by this Court in Vickory v. Walton, Sheriff, Butler County, No. 83-2111, 53 L.W. 3237 (Oct. 1, 1984), undertook an astute analysis of this Court's reasoning in Parratt, supra, and determined that 42 U.S.C. Section 1983 was not meant to supply an exclusive federal remedy for every alleged wrong. The gist of the cause of action was a deprivation of property interest "without

due process of law." Under this analysis, the court held the plaintiff must plead and prove that the state remedies for redressing the wrong were inadequate and that, in a procedural due process case under 42 U.S.C. Section 1983 plaintiff must attack the state corrective procedure as well as the substantive wrong. In Vickory v. Walton, supra, the Sixth Circuit held that the plaintiff had neither alleged nor shown any significant deficiency of the state remedy. Applying the analysis and pleading requirement of the Sixth Circuit in Vickory v. Walton to the pleadings and proof on file herein, it is clear that Appellees have neither alleged nor proven a cause of action under 42 U.S.C. Section 1983 and Appellants were entitled to a dismissal of the action for failure to state a claim upon which federal relief could be granted.

CONCLUSION

For all of the foregoing reasons, the Judgment of the United States Court of Appeals for the Ninth Circuit should be reversed, and the case remanded with instructions to dismiss the Complaint under F.R.C.P. Rule 12(b)(1) for lack of jurisdiction over the subject matter, and under F.R.C.P. Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

DATED: November 15, 1984.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, hereby certify that on this 15th day of November, 1984, the original and 40 copies of the within Amicus Curiae Brief were deposited in the United States Post Office in Phoenix, Arizona, with first-class postage prepaid, and properly addressed to the Clerk of the Untied States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

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APPENDIX "A"

A copy of papers filed by the moving party, Playtime Theatres, Inc., in Playtime Theatres, Inc., et al. v. Eikenberry, in the United States District Court For The Eastern District of Washington, No. C-82-239-RJM, on the motion for contempt order of Playtime Theatres, Inc. against the City of Renton and Lawrence J. Warren, both as City Attorney of Renton and as the relator on behalf of the State of Washington.

(Reference: Amicus Curiae Brief at page 4, footnote 1.)

Motion for Contempt Order A-2 - A-3

Memorandum in Support of Contempt Order (less Exhibits "B" through "I") A-4 - A-12

Exhibit "A" to Motion for Contempt Order Second Amended and Supplemental Complaint in City of Renton, et al. v. Playtime Theatres, Inc., et al. A-13 - A-66

Motion for Order Shortening Time and Order A-67 - A-68

Order To Show Cause Why Order of Contempt Should Not Issue A-69 - A-70

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

PLAYTIME THEATRES, INC., a Washington Corporation, Plaintiff,	NO. C-82-239-RJM
v.	MOTION FOR CONTEMPT ORDER
THE HONORABLE KENNETH EIKENBERRY, etc., et al., Defendants.	

COMES NOW Playtime Theatres, Inc., one of the plaintiffs herein, and moves the Court for an Order finding the City of Renton and Lawrence J. Warren, both as City Attorney of Renton and as the relator on behalf of the State of Washington, to be in contempt of that lawful Order entered in the above-entitled matter on April 13, 1982 and providing for punishment by fine therefor pursuant to 18 U.S.C. Section 401.

This motion is based upon 28 U.S.C. Section 1651, 28 U.S.C. Section 2283 and 18 U.S.C. Section 401.

DATED this 30th day of June, 1983.

BURNS & MEYER, P.S.

BY _____

Jack R. Burns

Attorney for

Plaintiff

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

PLAYTIME THEATRES, INC., a Washington corporation, Plaintiff, v. THE HONORABLE KENNETH EIKENBERRY, etc., et al., Defendants.	NO. C-82-239-RJM MEMORANDUM IN SUPPORT OF CONTEMPT ORDER

FACTS

On or about May 18, 1983 the City of Renton, on behalf of the State of Washington, filed an Amended and Supplemental Complaint in the King County Superior Court against Playtime Theatres, Inc., one of the plaintiffs herein. A copy of that Complaint, without exhibits, is attached hereto as Exhibit "A". Causes of action three, four and five of that Amended and Supplemental Complaint allege and seek to enforce the provisions of House Bill 626 (Chapter 7.48A RCW). The State of Washington is presently

under an injunction preventing it from prosecuting any of the provisions of that statute. A copy of this Court's Order is attached hereto as Exhibit "B". The City has likewise sought to enforce the provisions of Initiative Measure No. 335 which was previously declared by this Court to be unconstitutional in Cause Number C77-353, Spokane Arcades v. Ray, 449 F.Supp. 1145 (E.D. Wash. 1978).

On June 27, 1983, Playtime Theatres, Inc. brought on a motion before the King County Superior Court to dismiss those portions of Renton's third, fourth and fifth causes of action that relied solely on the provisions of Chapter 7.48 found unconstitutional by this Court. A copy of Playtime's motion and memorandum are attached hereto as Exhibits "C" and "D" respectively. On June 27, 1983, the Honorable Richard Ishikawa denied the motion of Playtime Theatres, Inc.

expressing the view that the state court should have an opportunity to constitutionally construe the provisions of Initiative Measure No. 335 in spite of the fact that the federal courts had found no narrowing construction possible. The Court refused to dismiss in spite of the fact that the Washington State Court of Appeals had found the provisions independently unconstitutional on state grounds. A copy of Judge Ishikawa's Order is attached hereto as Exhibit "E".

Playtime Theatres, Inc. has subsequently brought a Motion to Dismiss all claims of the City of Renton which are based upon Chapter 7.48A RCW which matter is set for hearing on July 7, 1983. A copy of Playtime's motion and memorandum are attached hereto as Exhibits "F" and "G", respectively. Due to the state court ignoring the decision in Spokane Arcades v. Ray, supra, which

was subsequently affirmed on appeals 631 F.2d 135 (1980) and 445 U.S.1165, 102 S.Ct. 1040, 71 L.Ed.2d 322 (1981), it is anticipated that the state court will allow the City of Renton to continue to violate this court's Order entered April 13, 1982.

This Order remains in effect by virtue of the Order entered by this Court on July 26, 1982 and the Order entered in the United States Court of Appeals for the Ninth Circuit which establishes that the Court's Order in Exhibit "B" remain in full force and effect pending the outcome of the matter in the Ninth Circuit Court of Appeals. A copy of the July 26, 1982 Order is attached hereto and marked Exhibit "H". A copy of the Court of Appeals Order is attached hereto and marked Exhibit "I".

ISSUE PRESENTED

Is the filing of the Complaint by the City of Renton in violation of the Court's Order entered April 13, 1982?

ARGUMENT

The Court ordered in its April 13, 1982 Order as follows:

> ORDERED, that defendants shall bring no prosecutorial action under this legislation until a determination on the merits may be reached pursuant to the schedule in this Order. This will in no way interfere with the various enforcement agencies' authority to pursue any litigation now pending under RCW 9.68.010, or to bring new actions under any other appropriate legislation outside the bounds of H.B. 626.

This Order continues to be in effect by virtue of the Order granting a stay of the Court's decision dated July 26, 1982 and the subsequent Order of the Ninth Circuit Court of Appeals. The Order of July 26, 1982 granted a stay of the Court's Order denying plaintiff's prayer

for injunctive relief until such time as the Court of Appeals either grants or denies the applciation for stay or injunction pending appeal. The subsequent Order by the Court of Appeals provides: "the district court's stay of its decision will remain in force during the pendency of this appeal." The clear intent and effect of these two orders is to provide that the preliminary injunction ordering the defendants not to bring any prosecutorial action under this legislation shall remain in full force and effect during the pendency of the appeal. Since the matter continues to be considered by the Ninth Circuit Court of Appeals, the defendants are bound by this Order.

The City of Renton brings its Complaint based on Chapter 7.48 RCW in the name of the State of Washington which is a party hereto and subject to the

injunction Order. The Court in this matter has jurisdiction to cause enforcement action against any city, township or county of the State of Washington which attempts enforcement action under Chapter 7.48A RCW during the pendency of the plaintiff's appeal. Castro v. Beecher, 386 F.Supp. 1281 (D.C. Mass. 1975). In the Castro v. Beecher, supra, case the director of the State of Massachusetts Civil Service Commission was named along with certain other Massachusetts cities and towns. An injunction was issued preventing them from enforcing the state civil service law in that it violated the civil rights of the participants. Subsequent to that, other cities which were not specifically named in the original lawsuit sought to enforce the civil service law and the court found at 1282:

> The Civil Service Commission and its

> director were defendants in the original action; however, none of the cities and towns against whom petitioners now seek relief were parties to the original case. This court has ancillary jurisdiction over this matter. Board of Education v. York, 429 F.2d 66 (10th Cir. 1970); 1 Moore Federal Practice Section 0.90[3] at 822 (2nd Ed. 1974).

The City of Renton's action in this matter is a blatant disregard of the Court's lawful Order. It is patently offensive inasmuch as it has brought the action against Playtime Theatres, Inc. with full knowledge and awareness and understanding of the Court's Order. The City should be held responsible to the Court pursuant to 18 U.S.C. Section 401 and a substantial punishment by fine should be imposed for the blatant manner in which the Court's previous Order has been ignored. The Court cannot allow such blatant violations and continue to retain its integrity.

CONCLUSION

For the foregoing reasons, Playtime Theatres, Inc. respectfully submits that the Court should enter an Order finding the City of Renton to be in contempt of the lawful Order entered April 13, 1982 and impose a substantial fine for that contempt.

Respectfully submitted this ____ day of _____, 1983.

BURNS & MEYER, P.S.

BY _____
Jack R. Burns
Attorney for
Playtime Theatres

EDITOR'S NOTE

PAGES A-13 thru B-33 WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CITY OF RENTON, a municipal corporation; LAWRENCE J. WARREN, City Attorney of the City of Renton; STATE OF WASHINGTON, ex rel. LAWRENCE J. WARREN, City Attorney of the City of Renton, Plaintiffs, v. PLAYTIME THEATRES, INC., a Washington corporation, KUKIO BAY PROPERTIES, INC., a Washington corporation, ROGER H. FORBES and JANE DOE FORBES, husband and wife, ROBERT B. McRAE and ELIA C. McRAE, husband and wife, ROBERT E. FEY and CAROL FEY, husband and wife, GERALD W. MARIS and HELEN MARIS, husband and wife, BRYCE A. LOSEY, SHERRIE RICHTER, WILLIAM JIRSA, PAT R. DeLONG, and DOES 6 through 10, Defendants.	NO. SECOND AMENDED AND SUPPLEMENTAL COMPLAINT FOR DECLARATORY JUDGMENTS; INJUNCTIONS; ABATEMENT OF MORAL NUISANCES (R.C.W. CHAPTER 7.24, 7.40, 7.48 AND 7.48A)

Now comes the City of Renton joined by Lawrence J. Warren, its City Attorney, and for their Complaint against the Defendants herein complain and allege as follows:

ALLEGATIONS COMMON TO ALL COMPLAINTS

1. Plaintiff City of Renton is a municipal corporation organized and existing under the laws of the State of Washington and the Optional Municipal Code (R.C.W. Chapter 35A). Lawrence J. Warren, as Plaintiff and as relator for the State of Washington, is now and at all times herein mentioned was the City Attorney of the City of Renton.

2. Plaintiffs are informed and believe and therefore allege that the Defendant Kukio Bay Properties, Inc. (hereinafter "Kukio") and the Defendant Playtime Theaters, Inc., (hereinafter "Playtime") are corporations organized and existing under the laws of the State of Washington, with their principal places of business located in King County, Washington.

3. Plaintiffs are informed and believe and therefore allege that on or about January 26, 1982, the Defendant

Kukio purchased two motion picture theaters within the city limits of Renton, King County, Washington known as the Renton Theater and Roxy Theater, commonly described as 507 and 504 South Third Street, respectively, and more particularly described as follows:

RENTON THEATER:
Lot 4 and the West 2 feet of Lot 3, Block 34, Smither's Second Addition to the Town of Renton, according to the plat recorded in Volume 10 of Plats, page 28, records of King County, Washington, and

ROXY THEATER:
Lots 1 and 2, Block 6, Smither's Sixth Addition to the Town of Renton, according to the plat recroded in Volume 26 of Plats, page 47, records of King County, Washington,

Situated in King County, Washington

4. The Renton Theater is located within the following distances of the following existing zones and uses:

a. Adjacent to a multiple residential use located at 306 Morris Ave. So., Renton; and 30 feet from a single family residential use located at

310 Morris Ave. So., Renton.

b. 30 feet from a church commonly known as Awareness of Life Christian Metaphysics Church and located at 311 Smithers Ave. So.; 270 feet from a church commonly known as St. Anthony's Catholic church located at 406 So. 4th Street; and 280 feet from a church commonly known as Martin Luther King, Jr., Memorial Baptist Church located at 324 Smithers Ave. So.

c. 620 feet from Renton High School located at 400 So. 2nd Street; and 470 feet from St. Anthony's Parochial School located at 314 So. 4th Street.

5. The Roxy Theater is located within the following distances of the following existing zones and uses:

a. Adjacent to a multiple residential use.

b. 210 feet from a church commonly known as Awareness of Life Christian Metaphysics Church located at 311 Smither

Ave. So.; 420 feet from a church commonly known as St. Anthony's Catholic Church located at 406 So. 4th Street; and 430 feet from a church commonly known as Martin Luther King, Jr., Memorial Baptist Church located at 324 Smithers Ave. So.

c. 420 feet from Renton High School located at 400 So. 2nd St.; and 530 feet from St. Anthony's Parochial School located at 314 So. 4th Street.

6. Defendant Roger H. Forbes and Jane Doe Forbes, whose true name is unknown to Plaintiffs, are a marital community under the laws of the State of Washington. The obligation of Roger H. Forbes is the obligation of the marital community. Plaintiffs are informed and believe and therefore allege that the Defendant Roger H. Forbes is the President and sole officer, director and stockholder of the Defendant Playtime and has been since the incorporation of

Playtime in 1976. Plaintiffs are informed and believe and therefore allege that the Defendant Roger H. Fobes is the President and sole officer, director and stockholder of the Defendant Kukio and has been since the incorporation of Kukio in 1976. Plaintiffs are informed and believe and therefore allege that the defendant Roger H. Forbes is the only person who is authorized to make management decisions for the Defendant Playtime and the Defendant Kukio.

7. Plaintiffs are informed and believe and therefore allege that the Defendant Roger H. Forbes was and now is the principal and alter-ego of the Defendant Playtime and the Defendant Kukio and that he is beneficially interested in the income, profits, and financial success of said corporations and has dominated, influenced, and controlled the business and affairs of

said corporations so that there is such a unity of interest in ownership between said person and said corporations. The said corporations are not organized for a lawful purpose as required by R.C.W. 23A.08.010. Therefore, the individuality and separateness of said person and said corporations has ceased to exist, and that adherence to the fiction of the separate existence of said Defendants herein would, under the circumstances, tolerate a fraud and promote an injustice.

8. Defendants Robert E. Fey and Carol Fey, husband and wife, and Defendants Gerald W. Maris and Helen Maris, husband and wife, are marital communities existing under the laws of the State of Washington and are sellers and the assignees of other sellers under that certain real estate contract dated June 5, 1978 and recorded under King

County Recording No. 78061405690, by which Defendants Robert B. McRae and Elia C. McRae, husband and wife, purchased the Renton Theater more particularly described above. Defendants Fey and Maris may claim some interest in the real property which is the subject of this action. Defendants Robert B. McRae and Elia C. McRae, husband and wife, are a marital community existing under the laws of the State of Washington. Defendants McRae are Sellers under that certain Real Estate Contract dated January 26, 1982, and recorded under King County Recording No. 8201260640, by which Defendant Kukio purchased the real property more particularly described above. That Real Estate Contract was amended by instrument in writing dated March 18, 1983, and recorded under King County Recording No. 8303311087. Defendants McRae may claim some interest in the real property which

is the subject of this action.

9. Plaintiffs are informed and believe and therefore allege that Defendants Does I through V are the managers and/or persons in charge of the Renton Theater, whose true names, are as follows:

John Doe I and IV - Bryce A. Losey
John Doe II - Sherrie Richter
John Doe III - William Jirsa
John Doe V - Pat R. DeLong

Plaintiffs are informed and believe and therefore allege that additional persons, whose identify is presently unknown to the Plaintiffs may hereafter become known to the Plaintiffs as the managers or acting managers and/or persons in charge of the Renton Theater. Such individuals are identified as John Does VI through VIII. The true names of John Does VI through VIII will be pleaded by the Plaintiffs hereafter upon receipt of knowledge as to their identity.

10. Plaintiffs are informed and believe and therefore allege that the Defendants Does IX and X are the writers, creators, solicitors, promoters, advertisers, publicists, distributors, and/or suppliers of the motion picture films being supplied to and exhibited at the Renton Theater and are in some way responsible for the creation and/or maintenance of the uses hereinafter described and alleged as occurring at said location.

11. The true names and capacities, whether individual, plural, corporate, associate, or otherwise of the Defendants Does 1 through 10 are unknown to Plaintiffs, who therefore sue said Defendants by such fictitious names and will ask leave of court to amend this complaint to show said Defendants true names and capacities when the same have been ascertained by the Plaintiff.

12. Plaintiffs are informed and believe and therefore allege that on or about January 26, 1982, the Defendant Kukio leased said Renton Theater and Roxy Theater to the Defendant Playtime by written agreement for a period of ten years commencing on or about January 27, 1982, with an option to renew the lease for an additional term of ten years terminating on January 26, 2002. Said lease agreements provided that such premises were to be used for the purpose of conducting the business of an "adult motion picture theater" exhibiting "adult film fare." The Defendant Playtime took possession of the theaters on or about January 27, 1982, and commenced operating said theaters as non-adult motion picture theaters, in that said theaters exhibited motion picture films which do not reasonably come within the definition of "adult film fare."

13. Beginning on or about January 20, 1983 and repeatedly and continuously thereafter, the Defendants and each of them have commercially exhibited, or caused to be exhibited, as a regular course of business, and possessed for the purpose of such exhibition, the following motion picture films which have been exhibited continuously at the Renton Theater on the below listed dates:

	PROGRAM	DATE EXHIBITED
1)	Deep Throat Devil In Miss Jones	1/20/83 - 2/10/83
2)	Blue Jeans Naughty Network	2/11/83 - 2/17/83
3)	American Desire All American Girls	2/18/83 - 3/3/83
4)	Foxholes Randy, The Electric Lady	3/4/83 - 3/10/83
5)	Scoundrels Foxtrot	3/11/83 - 3/17/83
6)	Irresistible Scheherezade, One Thousand and One Erotic Nights	3/18/83 - 3/24/83
7)	Satisfactions Pandora's Mirror	3/25/83 - 3/31/83
8)	Debbie Does Dallas Debbie Does Dallas II	4/01/83 - 4/07/83
9)	Little Girls Lost Ring of Desire	4/08/83 - 4/14/83
10)	The Dancers Between the Sheets	4/15/83 - 4/21/83

11)	Daddy's Little Girl The Little French Maid	4/22/83 - 4/28/83
12)	Every Which Way She Can Nightlife	4/29/83 - 5/05/83
13)	Expose Me Now Stormy	5/06/83 - 5/12/83
14)	Young Doctors in Lust Intimate Explosions	5/13/83 - 5/19/83
15)	Up and Coming Scheherezade, 1001 Erotic Nights	5/20/83 - 5/26/83
16)	Up and Coming Insatiable	5/27/83 - 6/02/83
17)	Puss and Boots Seduction of Cindy	6/03/83 - 6/09/83
18)	Peepholes Body Talk	6/10/83 - 6/16/83
19)	Little Girls Blue II The Best of Alex De Renzy	6/17/83 - 6/23/83
20)	Tinsel Town Princess Seka	6/24/83 - 6/30/83
21)	Skin Deep Babe	7/01/83 - 7/07/83
22)	Doing It Baby Cakes	7/08/83 - 7/14/83
23)	Nasty Girls Little Darlin's	7/15/83 - 7/21/83
24)	San Fernando Valley Girls Brief Affair	7/22/83 - 7/28/83
25)	Hot Dreams Society Affairs	7/29/83 - 8/04/83
26)	Memphis Cathouse Blues Country Comfort	8/05/83 - 8/11/83
27)	Luscious Angel Cash	8/12/83 - 8/18/83
28)	Devil In Miss Jones II Greatest Little Cathouse in Las Vegas	8/19/83 - 8/25/83
29)	Taboo I Taboo II	8/26/83 - 9/08/83
30)	Eat at the Blue Fox Love in Strange Places	9/09/83 - 9/ /83

Plaintiffs are informed and therefore allege on information and belief that Defendants will continue to exhibit sexually explicit films, the names of which are presently unknown to the Plaintiffs and which will be pleaded at time of trial.

14. For the purpose of marshalling evidence to prove the doing of wrongful acts, Plaintiff City of Renton directed certain individuals, acting as its agents to enter the Renton Theater, and view and photograph the visual images, conduct and scenes being depicted on the motion picture screen therein, and tape record the sound track being played in said theater. Said individuals acting as agents of the City of Renton, paid the required admission fee at the time they entered the Renton Theater with funds supplied by the City of Renton.

15. Time-and-motion studies of each

of the 28 motion picture films named in Paragraph 13 above, have been prepared. Such time-and-motion studies, consisting of a chronological series of photographs timed in their relative order of appearance, fairly and accurately depict the sexual conduct, normal and perverted, actual and simulated being portrayed on the motion picture screen on the dates such photographs were taken. The time and motion studies of such films allege and show by specific pleading that the Renton Theater was and is being "used" as an "adult motion picture theater" in violation of Renton Zoning Ordinance No. 3526, as amended.

FIRST CAUSE OF ACTION

DECLARATORY JUDGMENT RE CITY OF RENTON ORDINANCE Nos. 3526, 3629 and 3637. (Chapter 7.24 R.C.W.)

Comes now the Plaintiff City of Renton to request a declaratory judgment pursuant to Chapter 7.24 R.C.W. and to

complain and allege as follows:

16. Plaintiff City of Renton incorporates herein by reference each and every allegation of Paragraphs 1 through 15, inclusive, as though set forth herein in full.

17. On April 13, 1981, the Plaintiff City of Renton enacted City of Renton Ordinance No. 3626 entitled: "An Ordinance of the City of Renton, Washington, Relating to Land Use and Zoning" (hereinafter referred to as the "Renton Adult Use Ordinance"), a true and correct copy of which is attached hereto as Attachment "A" and incorporated herein by reference as though set forth herein in full. By the terms of said ordinance, an "adult motion picture theater", as defined in the ordinance, is a prohibited land use within the area circumscribed by a circle which has a radius consisting of the following distances from the

following specified uses or zones:

a. Within, or within one thousand feet of, any residential zone, or any single family or multiple family residential use.

b. Within one mile of any public or private school.

c. Within one thousand feet of any church or other religious facility or institution.

d. Within one thousand feet of any public part or P-1 zone.

18. On May 3, 1982, the City Council of the City of Renton passed and adopted Ordinance No. 3629 as an emergency measure, to be effective as of the date of its passage and approval by the mayor on May 3, 1982, amending Ordinance No. 3526. A copy of Ordinance 3629 is attached hereto as Attachment "C" and incorporated herein by reference as though set forth herein in full. The principle changes were:

(1) The amending ordinance contained a statement of the reasons for enactment of both Ordinance No. 3526 and

Ordinance No. 3629;

(2) A definition of the word "used" was added;

(3) Violation of the use provisions of the ordinance was declared to be a nuisance per se which was required to be abated by civil action and not by criminal enforcement;

(4) The required distance of an adult theatre from a school was reduced from one mile to 1,000 feet; and,

(5) A severability clause was added.

19. On June 14, 1982, the City Council of the City of Renton passed a third ordinance, No. 3637, which was identical to Ordinance No. 3629 in all respects except that the emergency clause was deleted and the ordinance was to become effective as a regular ordinance thirty days following its publication. A copy of Ordinance No. 3637 is attached hereto as Attachment "D" and incorporated herein by reference as though set forth herein in full.

20. On January 20, 1982, the Defendants Kukio and Playtime filed an action in the United States District Court for the Western District of Washington at Seattle entitled "Complaint for Declaratory Judgment and Preliminary Injunction", alleging federal jurisdiction under 28 U.S.C. § 1131(a), 42 U.S.C. § 1983 and 28 U.S.C. § 2202 and Rule 57 of the Federal Rules of Civil Procedure, challenging the constitutionality of City of Renton Ordinance No. 3526. On February 9, 1982, the Defendants Kukio and Playtime filed and served a new verified Complaint entitled "Amended and Supplemental Complaint for Declaratory Judgment and Preliminary and Permanent Injunction", a copy of which is attached hereto as Attachment "B" and incorporated herein by reference as though set forth herein in full.

21. On February 19, 1982, the Plaintiff City of Renton filed the within civil action in King County Superior Court seeking a declaratory judgment that Ordinance No. 3526 was constitutional as applied to the use of the Renton and Roxy theaters as proposed and described in the Defendants Kukio and Playtime's verified Amended and Supplemental Complaint and in the deposition of the Defendant, Roger H. Forbes, taken on April 9, 1982. Concommitantly, the City of Renton moved to dismiss the above described federal action and for summary judgment in such action on several grounds, including grounds that the U.S. District Court lacked subject matter jurisdiction to adjudicate the constitutionality of Renton Zoning Ordinance No. 3526 <u>as applied</u> to the theaters because of the pendency of the state action. On February 18, 1983, the U.S. District

Court denied the City's Motion to Dismiss on Jurisdictional Grounds but granted the City of Renton's Motion for Summary Judgment. On April 29, 1983 the Court filed its order denying the Defendants' Motion to Amend or Alter its Judgment in the federal action.

22. A controversy and dispute now exists between the Plaintiff City of Renton and the Defendants relating to their legal rights and duties and the effect of "City of Renton Adult Use Ordinance", being Ordinance No. 3526 as amended by Renton Ordinances No. 3629 and No. 3637, upon Defendants as follows:

a. Plaintiff City of Renton claims that the "City of Renton Adult Use Ordinance", as amended, is constitutional on its face. Defendants claim that said ordinance is unconstitutional on its face.

b. Plaintiff City of Renton claims

that the "City of Renton Adult Use Ordinance", as amended, is constitutional as applied to the "adult motion picture theater" land use originally proposed by the Defendants and the "adult motion picture theater" land use actually employed by said Defendants from and after January 20, 1983, as more fully described in Paragraphs 14, 15 and 16 of this Complaint. Defendants claim that said ordinance is unconstitutional as applied to the land use as originally proposed and as actually employed by the Defendants from and after January 20, 1983.

c. Plaintiff City of Renton claims that the component parts of the "City of Renton Adult Use Ordinance" as originally enacted and as amended are independent and severable and that this Court has the duty and obligation to interpret the same in a constitutional manner, so as to give

effect to the general purpose of the City Council of the City of Renton and its manifest intention. Defendants claim that said ordinance is not susceptible of a constitutional construction and is not severable.

d. Plaintiff City of Renton claims that, pursuant to the provisions of the "City of Renton Adult Use Ordinance", as amended, an "adult motion picture theater" is a permitted use within the B-1 and more intensive land use zoning classifications currently in use within the City of Renton except to the extent that the specific use is prohibited by the terms of said ordinance, and that there is no requirement that an application be made for a special permit, conditional use or variance prior to the commencement of such specific land use. Defendants claimed in their verified "Amended and Supplemental Complaint for

Declaratory Judgment and Preliminary and Permanent Injunction", filed on February 9, 1982 in the United States District Court for the Western District of Washington, entitled Playtime Theaters, Inc., a Washington Corp., and Kukio Bay Properties, Inc., a Washington Corp. v. The City of Renton, et al., No. C 82-59M, that the "City of Renton Adult Use Ordinance", as amended, provides a new use classification within the zoning laws of the City of Renton of an "adult motion picture theater" which is not a permited use within any zoning classification currently in the City of Renton, thereby requiring the Defendants to obtain a special permit, conditional use or variance prior to commencement of such use.

e. Plaintiff City of Renton claims that the "City of Renton Adult Use Ordinance", as amended, prohibits the

Defendants from using the specific motion picture theater premises described herein as an "adult motion picture theater." Defendants deny such claim.

23. That no adequate remedy other than that herein prayed for exists by which the rights of the parties hereto may be determined.

WHEREFORE, Plaintiff City of Renton prays for relief as follows:

1. That the Court declare that the "City of Renton Adult Use Ordinance", being Ordinance No. 3526, as amended by Ordinance No. 3629 and No. 3637, is constitutional on its face, valid for all purposes and in full force and effect.

2. That the Court declare that the "City of Renton Adult Use Ordinance", as amended, is constitutional as applied to the land use originally proposed and the land use actually employed by Defendants from and after the period commencing on

January 20, 1983 and continuing through and including the date of the filing of this Amended and Supplemental Complaint.

3. That the Court declare that it was the manifest intention of the Renton City Council to make the component parts of City of Renton Ordinances No. 3526, No. 3629 and No. 3637 independent and severable and that such parts are independent and severable.

4. That the Court declare that an "adult motion picture theater" is a permitted use within the B-1 and more intensive land use zoning classifications currently in use within the City of Renton, except to the extent that it may be prohibited by the "City of Renton Adult Use Ordinance", as amended, and that therefore no special permit, conditional use or variance application is required prior to the commencement of the land use of an "adult motion picture

theater" in areas of the city in which it is not prohibited by said ordinance.

5. That the Court declare that the Defendants' use, during the period commencing on January 20, 1983 and continuing through and including the date of the filing of this Amended and Supplemental Complaint, of the specific motion picture theater premises more particularly described herein, as an "adult motion picture theater" as defined in the ordinance was and is prohibited by the "City of Renton Adult Use Ordinance", as amended, and constitutes a per se public nuisance.

6. That the Court award the Plaintiff its costs and attorney's fees as provided by law and such other and further relief as the Court deems just and proper.

SECOND CAUSE OF ACTION

INJUNCTION RE CITY OF RENTON

ORDINANCE Nos. 3526, AS AMENDED BY ORDINANCES Nos. 3629 and 3637. (R.C.W. CHAPTER 7.40)

Comes now the Plaintiff City of Renton pursuant to the provisions of R.C.W. Chapter 7.40 to request an injunction against the Defendants herein and to complain and allege as follows:

24. Plaintiff City of Renton incorporates herein by reference each and every allegaton of Paragraphs 1 through 21, inclusive, as though set forth herein in full.

25. That there is no plain, adequate or speedy remedy at law available to the Plaintiff and that the Plaintiff will suffer irreparable damage unless the Defendants are restrained from exhibiting at the Renton Theater the type of motion picture films described in Paragraph 13 of this Complaint, and from further use of the Renton Theater as an "adult motion picture theater."

WHEREFORE, Plaintiff City of Renton prays for relief as follows:

1. For issuance of a preliminary injunction during the pendency of this proceeding restraining the Defendants and each of them from use of the Renton Theater as an "adult motion picture theater," that is, for the purpose of exhibiting motion picture films depicting, describing or relating to "specific sexual activities" and "specified anatomical areas," as defined in Renton Ordinance 3526, as amended by Ordinance Nos. 3629 and 3637, as a continuing course of conduct and in a manner which appeals to a prurient interest; and

2. A permanent injunction restraining the Defendants and each of them from use of the Renton Theater as an "adult motion picture theater", that is, for the purpose of exhibiting motion

picture films depicting, describing or relating to "specific sexual activities" and "specified anatomical areas" as defined in Renton Ordinance No. 3662, as amended by Ordinance Nos. 3629 and 3637, as a continuing course of conduct and in a manner which applies to a prurient interest; and

3. For entry of an order that the trial on the merits of the permanent injunction restraining the Defendants from use of the Renton Theater as an "adult motion picture theater" and from exhibiting at the Renton Theater motion picture films which depict "specified sexual activities" be advanced and consolidated with the hearing upon the application for the preliminary injunction.

4. That the Court award the Plaintiff its costs and attorney's fees as provided by law.

5. That the Court grant such other and further relief as the Court deems just and proper.

THIRD CAUSE OF ACTION

DECLARATORY JUDGMENT RE LEWD AND OBSCENE SUBJECT MATTER (MOTION PICTURE FILMS) BEING EXHIBITED AT THE RENTON THEATER AND USE OF THE RENTON THEATER AS A MORAL NUISANCE (CHAPTER 7.24 R.C.W.)

Comes now, the Plaintiffs City of Renton and Lawrence J. Warren, both as the City Attorney of Renton, and as the relator on behalf of the State of Washington to request a declaratory judgment pursuant to Chapter 7.24 R.C.W. and R.C.W. Sections 7.48.056, 7.48.058 and 7.48.900, and R.C.W. Sections 7.48A.020, 7.48A.030 and 7.48A.900, and to complain and allege as follows:

26. Plaintiffs incorporate herein by reference each and every allegation of Paragraphs 1 through 15, inclusive, as though set forth herein in full.

27. Statutes (a) On November 8, 1977, Initiative Measure No. 335 was approved by the electorate of this state, and is codified as Chapter 7.48 Nuisances; being R.C.W. Sections 7.48.050, 7.48.052, 7.48.054, 7.48.056, 7.48.058, 7.48.060, 7.48.062, 7.48.064, 7.48.066, 7.48.068, 7.48.070, 7.48.072, 7.48.074, 7.48.076, 7.48.078, 7.48.080, 7.48.085, 7.48.090, 7.48.100, and 7.48.900. R.C.W. Section 7.48.900 is a severability clause which provides as follows:

> 7.48.900 Severability--Initiative Measure No. 335. If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

(b) Substitute House Bill No. 626 entitled "An Act Relating to Pornography and Moral Nuisances", was passed by the

State Legislature during its 1982 Regular Session and was signed into law on April 1, 1982 by the Governor of the State of Washington, to take effect immediately. Sections 1 through 9 of said act are codified as Chapter 7.48A Moral Nuisances; being R.C.W. Sections 7.48A.010, 7.48A.020, 7.48A.030, 7.48A.040, 7.48A.050, 7.48A.060, and 7.48A.900. R.C.W. Section 7.48A.900 is a severability clause which provides as follows:

> 7.48A.900 Severability--If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

28. Each of the motion picture films described in Paragraph 13 above, is "lewd matter" and "obscene matter" as the term "lewd matter" is defined in R.C.W. Section 7.48.050(2), and in R.C.W.

Section 7.48A.010(2), and as said term is construed and applied by the Washington State Supreme Court. The visual depictions and allegations regarding the story line content appearing in the legends of the time-and-motion studies referred to in Paragraph 15 above will show by specific pleading that the 28 lewd and obscene films described in Paragraph 13 are all of one genre; namely, hard core pornography.

29. Each of the motion picture films described in Paragraph 13 above, is subject matter which is outside the protection of the Federal Constitution under the test articulated by the United States Supreme Court in Miller v. California, 413 U.S. 15, and Paris Adult Theater v. Slayton, 413 U.S. 49.

30. The Defendants' course of conduct and use of the premises at 507 South Third Street, Renton, Washington,

for the purpose of exhibiting obscene motion pictures as described above, establishes said premises as a public nuisance under the Revised Code of Washington in that the explicit sexual conduct and lewdness, which occurs in said motion pictures in two dimensional form and the exhibition of the same to the public at the Renton Theater constitutes a violation of specific community standards established by the Washington Criminal Statutes which proscribe such sexual conduct in public in three dimensional form.

31. The images and conduct portrayed upon the public screen and the accompanying sounds produced in such public theater incident to the exhibition of the motion picture films described in Paragraph 13 above constitute a public nuisance on such dates, which is separate and apart from the positive print and

sound projector instrumentalities which were used for their production. The exhibition of said motion pictures at said theater is "indecent and offensive to the senses" so as to essentially interfere with the comfortable enjoyment of life and property and, therefore, constitutes an actionable public nuisance per se under R.C.W. Section 7.48.010.

32. The lewd and obscene motion picture films described in Paragraph 13 above are unlawful subject matter and contraband as to which no property rights may be acquired under R.C.W. Section 7.48.090.

33. The moneys received by the Defendants as admission price to the exhibition of the lewd and obscene motion picture films described in Paragraph 13 above constitute gain derived from a wrongful act, an unjust enrichment, and a moral nuisance under R.C.W. Section

7.48.054(1) as personal property used in conducting and maintaining a moral nuisance. As such they are subject to forfeiture to the City of Renton and King County, and to an accounting under R.C.W. Section 7.48.090.

34. The instrumentality by which such nuisance is made possible is a positive print of the motion picture through which a light source is passed from a motion picture projector which projects images from such positive print onto the screen of, and broadcasts sounds in, said motion picture theater. The positive prints of said lewd and obscene films and all copies of a like nature each constitute a moral public nuisance under R.C.W. Section 7.48.052(3).

35. Pursuant to R.C.W. Section 9.66.010, R.C.W. Section 7.48.120, and R.C.W. Section 7.48.130, the acts of Defendants, and each of them, in

maintaining the business operation located at the premises commonly known as the Renton Theater, are unlawful and constitute a public nuisance.

36. Pursuant to R.C.W. Section 7.48A.020(1), the premises commonly known as the Renton Theater is a moral nuisance in that it is a place where lewd and obscene films, as defined in R.C.W. Section 7.48A.010(2), are publicly exhibited as a regular course of business, or are possessed for the purpose of such exhibition.

37. Pursuant to R.C.W. Section 7.48A.020(2), each and every motion picture film specifically named in Paragraph 13 above, is a moral nuisance in that each and every film is a lewd and obscene film, as defined in R.C.W. Section 7.48A.010(2), which has been publicly exhibited, or possessed for such purpose at a place which is a moral

nuisance under Section 7.48A.020(1).

38. The Defendants, and each of them, have with knowledge maintained each and every moral nuisance, as defined in R.C.W. Section 7.48.050(1) and R.C.W. Section 7.48A.010(1).

39. The Renton Theater is a place where lewd and obscene films, as defined by R.C.W. Section 7.48.050(2), are publicly exhibited as a regular course of business, or are possessed for the purpose of such exhibition and, pursuant to R.C.W. Section 7.48.052(1), is a moral nuisance.

40. Each and every motion picture film specifically named in Paragraph 13 above is a lewd and obscene film, as defined by R.C.W. Section 7.48.050(2), which has been publicly exhibited, or possessed for such purpose at a place which is a moral nuisance under R.C.W. Section 7.48.052(1), and, pursuant to

R.C.W. Section 7.48.052, is a moral nuisance.

41. Each and all of the foregoing acts and conduct in the use of Defendants' property for the purposes and in the manner aforesaid, are maintained and perpetuated by the Defendants with malice; that is, with a willful, conscious disregard of the rights of the Plaintiffs, and with a motive and willingness to vex, harass, annoy, or injure the rights of the Plaintiffs.

42. Plaintiffs are informed and believed and based on such information and belief allege that the Defendants and each of them will continue to exhibit the same and other lewd and obscene motion picture films in the future at the Renton Theater.

43. Plaintiffs have no plain, speedy, or adequate remedy at law to prevent the acts and conduct aforesaid;

and unless the same is abated, Plaintiffs will suffer and are now suffering irreparable damage and loss.

44. A controversy and dispute now exists between the Plaintiffs and the Defendants relating to their legal rights and duties regarding the nature of the subject matter (motion picture films) being exhibited by the Defendants at the Renton Theater, the nature of the use being made by the Defendants of the Renton Theater and the applicability of certain sections of the Revised Code of Washington to the circumstances of this lawsuit as alleged in Paragraphs 26 through 43.

45. No adequate remedy other than that herein prayed for exists by which the rights of the parties hereto may be determined.

WHEREFORE, Plaintiffs, City of Renton and City Attorney of Renton as the

City Attorney of Renton and as the relator for the State of Washington pray for relief as follows:

1. That the Court declare that pursuant to the severability provisions of R.C.W. Section 7.48.900, the provisions of R.C.W. Sections 7.48,050, 7.48.052(1) and (3), 7.48.054(1), 7.48.056, 7.48.058, 7.48.060, 7.48.064, 7.48.070, 7.48.076 and 7.48.090 are severable and valid and can be applied in a constitutional manner to the circumstances and the parties in this lawsuit.

2. That the Court declare that pursuant to the severability provisions of R.C.W. Section 7.48A.900, the provisions of R.C.W. Sections 7.48A.010, 7.48A.020, 7.48A.030 and 7.48A.040 are severable and valid and can be applied in a constitutional manner to the circumstances and the parties in this

lawsuit.

3. That the Court declare that the Plaintiff City Attorney of Renton has standing to bring a declaratory judgment action seeking a determination regarding the validity of such statutory provisions, the existence of moral nuisances in the City of Renton and the right to have the same abated.

4. That the Court declare that each of the motion picture films named in Paragraph 13 is lewd and obscene matter as that term is defined in R.C.W. Section 7.48.050(2), and in R.C.W. Section 7.48A.010(2) and as construed and applied by the Washington State Supreme Court.

5. That the Court declare that the real estate known as the Renton Theater is and has been a moral nuisance since January 20, 1983 under the provisions of R.C.W. Section 7.48.052(1) and R.C.W. Section 7.48.020(1).

6. That the Court declare that each of the motion picture films named in Paragraph 13 is a moral nuisance under R.C.W. Section 7.48A.020(2).

7. That the Court declare that each of the motion picture films named in Paragraph 13 is lewd and obscene matter as a matter of law, that such films are contraband and that there are no property rights therein under Washington law.

8. That the Court declare that the moneys paid as admission price to the exhibition of the above described lewd and obscene films are derivative contraband and the subject of forfeiture; that the Plaintiffs are entitled to an accounting, and that such moneys are to be forfeited to the City of Renton and King County.

9. That the Court award Plaintiffs their costs and attorney's fees as provided by law.

10. That the Court grant such other and further relief as the Court deems just and proper.

FOURTH CAUSE OF ACTION

INJUCTION RE MORAL NUISANCES (R.C.W. CHAPTER 7.40, 7.48 AND 7.48A)

Comes now the Plaintiff Lawrence J. Warren, both as the City Attorney of Renton, and as the relator on behalf of the State of Washington to request an injunction pursuant to the provisions of R.C.W. Chapter 7.40, and R.C.W. Chapters 7.48 and 7.48A, (R.C.W. Sections 7.48.056, 7.48.058, 7.48.060, 7.48.064, 7.48.070, 7.48.076, 7.48A.020, 7.48A.030, 7.4A.040[1]), restraining the Defendants from further maintaining the herein described moral nuisances at the Renton Theater and to complain and allege as follows:

46. Plaintiffs incorporate herein by reference each and every allegation of

Paragraphs 1 through 15, and 27 through 43 inclusive, as though set forth herein in full.

47. That there is no plain, adequate, or speedy remedy at law available to the Plaintiff and that the Plaintiff will suffer irreparable damage unless the Defendants are restrained from exhibiting the lewd and obscene films described in Paragraphs 13 of this Complaint and from further maintaining the moral nuisances which exist at the Renton Theater as a result of such exhibitions.

WHEREFORE, Plaintiff prays for relief as follows:

1. For issuance of a preliminary injunction during the pendency of this proceeding restraining the Defendants and each of them from exhibiting the lewd and obscene films described in Paragraphs 13 of this Complaint at the Renton Theater.

2. For issuance of a permanent injunction restraining the Defendants and each of them from exhibiting the lewd and obscene films described in Paragraphs 13 of this Complaint and other lewd and obscene films at the Renton Theater.

3. For the entry of an order that the trial on the merits of the permanent injunction restraining the Defendants from exhibiting the lewd and obscene films described in Paragraphs 13 of this Complaint be advanced and consolidated with the hearing upon the application for the temporary injunction, pursuant to Washington Court Civil Rule 65(a)(2) and R.C.W. Section 7.48.064.

4. That the Court award the Plaintiff its costs of abatement, including a reasonable attorney's fee pursuant to R.C.W. Section 7.48.076 and 7.48.090.

5. That the Court grant such other

and further relief as the Court deems just and proper.

FIFTH CAUSE OF ACTION

ABATEMENT OF MORAL NUISANCES
(R.C.W. CHAPTER 7.48 AND 7.48A)

Comes now the Plaintiff Lawrence J. Warren, both as the City Attorney of Renton, and as the relator on behalf of the State of Washington, to request abatement of the moral nuisances being maintained by the Defendants at the Renton Theater and reformation of said real property pursuant to the provisions of the common law and R.C.W. Chapter 7.48 and 7.48A, and to complain and allege as follows:

48. Plaintiffs incorporate herein by reference each and every allegation of Paragraphs 1 through 15, and 27 through 43 inclusive, as though set forth herein in full.

WHEREFORE, Plaintiff prays for relief as follows:

1. That the Court, pursuant to R.C.W. Section 7.48.260, order that the aforesaid nuisances be abated and removed at the expense of the Defendants and issue a warrant of abatement which awards to Plaintiffs an estimated sum, to defray the expense of such abatement.

2. That the Court, pursuant to R.C.W. Section 7.48A.040, determine that the Defendants, and each of them, have with knowledge maintained moral nuisances, and impose a civil penalty and judgment of an amount as the Court may determine to be appropriate.

3. That the Court, pursuant to R.C.W. Section 7.48.056, abate the aforesaid moral nuisances as defined in R.C.W. Section 7.48.052, and R.C.W. Section 7.48.054, and enjoin the use thereof pursuant to R.C.W. Section 7.48.058 and perpetually enjoin the Defendants, and each of them, from

maintaining the same.

4. That the Court, pursuant to RCW Section 7.48.076, order that the entire expenses of abatement, including attorney's fees, shall be recoverable by the Plaintiffs as a part of their costs of the lawsuit.

5. That the Court, pursuant to R.C.W. Section 7.48.078, enter an order of abatement as part of the judgment in this cause, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance and that the Court direct the sale of such thereof as belong to the Defendants notified or appearing, in the manner provided for the sale of chattels under execution, except that the positive prints of obscene films shall not be sold but shall be destroyed or otherwise disposed of by the Court.

6. That the Court, pursuant to

R.C.W. Section 7.48.078, impose against Defendants and each of them, a penalty of Three Hundred Dollars ($300.00) for the maintenance of each and every nuisance as defined in R.C.W. Section 7.48.052 and Section 7.48.054, which penalty shall be collected by execution as in civil actions, and when collected, shall be paid into the current expense fund of King County.

7. That the Court, pursuant to R.C.W. Section 7.48.078, issue an order reforming the real estate and directing the effectual closing of the Renton Theater against its use by the Defendants for any purpose and keeping it closed for a period of one year.

8. That the Court, pursuant to R.C.W. Section 7.48.090: (1) declare that all moneys and other consideration declared to be a moral nuisance under R.C.W. Section 7.48.056 are the subject

of forfeiture to the City of Renton and King County and are recoverable as damages; and, (2) after judgment against the Defendants, and each of them, in these proceedings order that an accounting be made by the Defendants, and each of them, of all moneys received by them which have been declared to be a public nuisance; and (3) order an amount equal to the sum of all moneys estimated to have been taken in as gross income for such unlawful commercial activity be forfeited to the general funds of the City of Renton and King County, to be shared equally, as a forfeiture of the fruits of an unlawful enterprise and as partial restitution for damages done to the public welfare, public health, and public morals; and (4) determine the amount of the costs of abatement and assess the same as a lien on the real property known as the Renton Theater.

9. That the Court award the Plaintiff its costs and attorney's fees as provided by law.

10. That the Court grant such other and further relief as the Court deems just and proper.

DATED: September _____, 1983.

LAWRENCE J. WARREN
Attorney for Plaintiffs

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

LAWRENCE J. WARREN, City Attorney of the City of Renton, being first duly sworn upon oath, deposes and states: I am the attorney for the Plaintiffs herein. I have read the foregoing First Amended and Supplemental Complaint for Declaratory Judgments; Injunctions; Abatement of Moral Nuisances (R.C.W. Chapter 7.24, 7.40, 7.48 and 7.48A), know the contents thereof and believe the same to be true except as to matters which are therein stated upon my information or belief, and as to those matters that I believe it to be true.

LAWRENCE J. WARREN
Attorney for Plaintiffs

SUBSCRIBED AND SWORN to before me on September _____, 1983.

NOTARY PUBLIC in and for the State of Washington, residing at Renton.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

PLAYTIME THEATRES, INC., a Washington corporation, Plaintiff, v. THE HONORABLE KENNETH EIKENBERRY, etc., et al., Defendants.	NO. C-82-239-RJM MOTION FOR ORDER SHORTENING TIME AND ORDER

COMES NOW Playtime Theatres, Inc. and moves the Court for an Order shortening time in which the plaintiff's Motion for Contempt Order may be heard. This motion is based on the fact that a hearing is already set for July 8, 1983 in cause number C77-353 which arises out of the same action brought by the defendant, City of Renton in King County Superior Court. In the interests of efficiency and expediency, an Order shortening time should be granted. Further, there is no prejudice to the defendant in that all of the issues

stated in plaintiff's motion and memorandum have been stated in plaintiff's motion in the state action dated June 29, 1983.

Respectfully submitted this 30 day of June, 1983.

BURNS & MEYER, P.S.

BY _____
Jack R. Burns
Attorney for
Playtime Theatres

ORDER

IT IS SO ORDERED

DATED at Spokane, Washington this 6th day of July, 1983.

ROBERT J. McNICHOLS
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

PLAYTIME THEATRES, INC., a Washington corporation, Plaintiff, v. THE HONORABLE KENNETH EIKENBERRY, etc., et al., Defendants.	NO. C-82-239-RJM ORDER TO SHOW CAUSE WHY ORDER OF CONTEMPT SHOULD NOT ISSUE

THIS MATTER having come on for hearing before the Court on the motion of Playtime Theatres, Inc. for an Order finding the City of Renton and Lawrence J. Warren, both as City Attorney of Renton and as the relator in behalf of the State of Washingotn, in contempt of a lawful Order of this Court, and the Court having considered and read the motion and accompanying materials, and good cause apeparing therefor,

IT IS HEREBY ORDERED, that the City of Renton, and Lawrence J. Warren,[1/] both as the City Attorney of Renton, and as

the relator on behalf of the State of Washington, appear and show cause in the above-entitled Court on the 8th day of July, 1983 at 2:00 o'clock p.m., or as soon thereafter as counsel may be heard, why an Order finding these parties to be in contempt should not issue and why sanctions should not be imposed pursuant to 18 U.S.C. Section 401.

DATED at Spokane, Washington this 6th day of July, 1983.

ROBERT J. McNICHOLS
UNITED STATES
DISTRICT JUDGE

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1. As per oral stipulation of counsel, Mr. Warren's physical presence will not be required at the time of hearing.

APPENDIX "B"

Copies of papers filed by the opposition parties, City of Renton and its City Attorney, in Playtime Theatres, Inc., et al. v. Eikenberry, in the United States District Court For The Eastern District of Washington, No. C-82-239-RJM, on the motion for contempt order of Playtime Theatres, Inc., against the City of Renton and Lawrence J. Warren, both as City Attorney of Renton and as the relator on behalf of the State of Washington.

(Reference: Amicus Curiae Brief at page 4, footnote 1)

Memorandum of the City of Renton in Opposition To Motion For Contempt Order B-1 through B-12

Affidavit of Lawrence J. Warren in Opposition To Playtime Theaters, Inc. Motion For Contempt Order B-13 through B-15

Attachment "A" to Affidavit of Lawrence J. Warren, being "Statements of Facts re Plaintiffs' Opposition to Defendants' Motion For Dismissal in City of Renton, et al. v. Playtime Theatres, Inc., et al. Superior Court of Washington for King County, No. 82-2-02344-2 B-16 through B-33

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

PLAYTIME THEATRES, INC., a Washington corporation,	)	NO. C82-239 RJM
Plaintiff,	)	MEMORANDUM OF THE CITY OF RENTON IN OPPOSITION TO MOTION FOR CONTEMPT ORDER
vs.	)	
THE HONORABLE KENNETH EIKENBERRY, etc., et al.,	)	
Defendants.	)	

I. STATEMENT OF FACTS

Please refer to the separate Statement of Facts attached to the Affidavit of Lawrence J. Warren, City Attorney of the City of Renton and one of the Plaintiffs in the Superior Court for the State of Washington for the County of King action entitled "City of Renton, et al., Plaintiffs vs. Playtime Theatres, Inc., et al., Defendants", Cause No. 82-2-02344-2.

II. ARGUMENT

The federal courts have no jurisdiction to enjoin the action filed in the King County Superior Court by the City of Renton, et al., which relies in part on RCW Chapter 7.48A (House Bill 626). 28 U.S.C. Section 2283 prohibits a federal court from interfering with state court

proceedings with limited exceptions, none of which apply in this case.

Nothing in the records submitted by the Plaintiffs herein for this hearing establishes the rationale by which this Court, having found RCW Chapter 7.48A to be constitutional on its face, nevertheless enjoined enforcement thereof pending appeal, which temporary stay was continued by the United States Court of Appeals for the Ninth Circuit. This court must reconsider, for purposes of this extraordinary request for a finding of contempt against the City of Renton, et al., whether there is any jurisdictional basis for the orders entered herein which purport to have the effect of denying to the City of Renton reliance upon the remedies set forth in the constitutional legislation.

It is well settled that with limited exceptions, a federal court may not

enjoin proceedings in a state court. 28 U.S.C. Section 2283 provides as follows:

> "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Since federal courts are not courts of general jurisdiction, their jurisdiction must be made to appear. Here, the stay which has been issued has not been expressly authorized by any Act of Congress, the injunction is not necessary in aid of the jurisdiction of the federal court, and there is no final judgment of the federal court which may be effectuated or protected by the stay since the matter is still on appeal before the Ninth Circuit. Therefore, unless the Defendants herein can point to some other exception, the Anti-Injunction Statute quoted above prohibits the

federal court from issuing the injunction which has been issued.

The sole exception which the Defendants might attempt to come within would be the doctrine set forth in Huffman vs. Pursue Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed. 2d 482, reh. den. 421 U.S. 971, 95 S.Ct. 1969, 44 L.Ed. 2d 463 (1975). In Huffman, the United States Supreme Court reiterated the test for the limited exceptional circumstances in which a federal court may exercise jurisdiction to interfere with a pending state action. There the court held that a federal court may intervene in pending state actions "...where the district court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is 'flagrantly and patently violative of

express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be mad to apply it.'" Huffman, supra, at 611.

This is a burden that cannot be borne, particularly in the light of the ruling herein that RCW Chapter 7.48 is constitutional on its face. It may be that a federal court can issue a stay which will be effective to stay enforcement proceedings in other federal courts. But unless the prohibition of the Anti-Injunction Statute (28 U.S.C. Section 2283) is overcome by qualification for one of its exceptions, or the Defendants are able to come within the Huffman exception, a federal court following Huffman has no jurisdiction to stay an enforcement proceeding against a public nuisance which has been commenced

in the state court.

In this connection it is interesting to note that Justice Douglas in dissenting from the opinion of the court in Byrne vs. Karalexis, 396 U.S. 976, 24 L.Ed. 2d 447, at 486 (1969), argued that federal courts should be considered to have concurrent jurisdiction with state courts to entertain applications for injunctive relief to enjoin pending criminal prosecutions in the state courts. However, the holding in that case is that not only is there no concurrent jurisdiction which would give the federal courts jurisdiction to enjoin pending state criminal enforcement actions, the federal courts have no jurisdiction to do so.

This result is founded upon a proper foundation of the rule that a federal court lacks jurisdiction to

authoritatively construe state legislation. U.S. vs. Thirty Seven Photographs, 402 U.S. 363, 28 L.Ed. 2d 822, 91 S.Ct. 1400 (1971). This policy has further resolved into a doctrine which allows the legislation previously found to be unconstitutional on its face to be "revived" by a limiting construction or constitutional "gloss" applied by the state courts. See Footnotes 6 and 7 in Dombrowski vs. Pfister, 380 U.S. 479, 490, 85 S.Ct. 1116, 14 L.Ed. 2d 22 (1965), and Metromedia, Inc. vs. San Diego, 453 U.S. 490, 521, 101 S.Ct. 2882, 69 L.Ed. 2d 800 (1981). In Dombrowski, the Supreme Court held that, notwithstanding that a federal court may declare a state statute to be unconstitutional on its face so as to warrant the granting of a federal injunction against the application of the

state statute, the state governmental authorities may thereafter seek a restrictive interpretation of the statute in the state court and thus "revive" the statute as to prosecution against the others of future violations. This principle is further illustrated by the unusual action taken by the United States Supreme Court in Metromedia, supra, wherein, after finding a San Diego city ordinance to be unconstitutional on its face, the High Court remanded the cause back to the California Supreme Court for re-evaluation as to whether the California Supreme Court could render the ordinance a "limiting construction" which would save the statute.

It is for this reason that the City of Renton prevailed in the state court on Defendants' first motion for dismissal because of the Plaintiffs' reliance upon

RCW 7.48.050-.100 (Initiative 335) which had been previously held to be unconstitutional on its face. Even if RCW Chapter 7.48A had been held to be unconstitutional, the City of Renton would have been able to pursue a limiting construction of the act in the state courts to "revive" the statute under Dombrowski and Metromedia, as more particularly stated above. However, such an argument is unnecessary since this court has not found RCW Chapter 7.48 to be unconstitutional. In fact, the legislation has been held to be constitutional.

In any event, as stated in Atlantic Coast Line Railroad Company vs. Brotherhood of Locomotive Engineers, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed. 2d 234 (1970):

"Any doubts as to the propriety

> of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." at 297.
>
> "Proceedings in state court should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." at 287.

In any event, the relief to be fashioned by the state trial court following the trial of all issues has yet to be determined. The City of Renton has pleaded reliance upon RCW Chapter 7.48A in anticipation of the affirmance by the United States Court of Appeals for the Ninth Circuit of the well reasoned decision of this Court.

Certainly the City of Renton, and its City Attorney, were not parties to this action and their interest in the

application of this statute to the specific nuisance which is being conducted within the City of Renton by Playtime Theatres, Inc. was not adequately represented by other parties to this action. It cannot be maintained in good conscience that the City's reliance in part upon the remedies set forth in RCW Chapter 7.48A is in any fashion contemptuous of this Court. Certainly, this Court must be specifically advised that such a result was not intended. The considered scheme by which the City of Renton has brought its complaint within the state court based in part upon RCW Chapter 7.48A is not an action in contempt of this Court and Playtime Theatres' motion for a

finding as such must be denied.

DATED: July _____, 1983.

_____

DANIEL KELLOGG

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

PLAYTIME THEATRES, INC., a Washington corporation, et al., Plaintiffs, vs. THE HONORABLE KENNETH EIKENBERRY, et al., Defendants.	NO. C82-239 RJM AFFIDAVIT OF LAWRENCE J. WARREN IN OPPOSITION TO PLAYTIME THEATRES, INC. MOTION FOR CONTEMPT ORDER

LAWRENCE J. WARREN, being first duly sworn on oath, deposes and says:

I am the City Attorney of the City of Renton and am one of the Plaintiffs in the Superior Court of Washington for King County, Cause No. 82-2-02344-2, entitled City of Renton, a municipal corporation, et al., Plaintiffs, vs. Playtime Theatres, Inc., a Washington corporation, et al., Defendants." I make this affidavit of my own personal knowledge, being confident to testify herein.

The Statement of Facts filed in the Superior Court Cause mentioned above, and attached hereto as Attachment "A" and by this reference incorporated herein, is a

true and correct statement of the facts relative to the state of litigation which has existed since Playtime Theatres, Inc., and Kukio Bay Properties, Inc., both Washington corporations solely owned by ROGER H. FORBES, purchased theaters within the City of Renton for the purpose of exhibition therein of sexually explicit films.

In addition to the facts stated in Attachment "A" this Court should be informed that on June 27, 1983, Superior Court Judge Richard M. Ishikawa denied the Defendants' motion for dismissal, which a motion is more particularly described at Item 20 of the attached Statement of Facts.

On June 1, 1983, Playtime Theatres, Inc., sought and obtained, over the objection of the City of Renton, an order of the King County Superior Court

continuing the trial of the Motion for Preliminary Injunction until mid-September, 1983 in order to meet the convenience of the attorneys for Playtime Theatres, Inc.

Finally, Playtime Theatres, Inc. has filed a second motion to dismiss under CR 12(b)(6) alleging that the complaint filed in the state court is insufficient to state a cause of action upon which relief can be granted by reason of its partial reliance upon RCW Chapter 7.48A. That motion will be heard on July 7, 1983.

LAWRENCE J. WARREN

SUBSCRIBED AND SWORN to before me on July 7, 1983.

Notary Public in and for the State of Washington, residing at Renton.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CITY OF RENTON, et al, Plaintiffs, vs. PLAYTIME THEATRES, INC., et al, Defendants.	NO. 82-2-02344-2 STATEMENTS OF FACTS RE PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS FOR DISMISSAL UNDER

The following statement of facts is submitted in support of the Plaintiffs' memoranda in opposition to Defendants' motion for dismissal of Plaintiffs' first cause of action for declaratory judgment, and Defendants' motion for dismissal re RCW 7.48.050-.100, both of which motions are based upon CR 12(b)(6). The following facts are essential to a proper understanding of the legal principles involved in these motions for dismissal:

(1) On June 24, 1976 the United States Supreme Court decided the case of Young v. American Mini-Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed. 2d 310 (1976), upholding a Detroit zoning ordinance which prohibited (under the power of the zoning code) the use of certain properties for specified adult entertainment land uses.

(2) In May of 1980, the City of Renton had no theaters within its jurisdiction which exhibited sexually explicit films. The City Council began consideration of the enactment of zoning legislation dealing with adult entertainment land uses. Thereupon, a committee of the City Council held public hearings on the subject matter and received testimony concerning the adverse affect of adult entertainment land uses upon family oriented land uses within the City. On April 13, 1981 the City Council enacted Ordinance No. 3526. A copy of Ordinance No. 3526 is attached hereto as Attachment "A" and by this reference incorporated herein. The ordinance followed the Young case and the decision of the Washington State Supreme Court in Northend Cinemas v. Seattle, 90 Wn. 2d 709, 585 P.2d 1153 (1978) and added

definitions of "adult motion picture theater", "specified sexual activities", and "specified anatomical areas". The ordinance prohibited the location of an "adult motion picture theater" within the following distances from the following specified uses or zones:

> One thousand feet (1,000') of any residential zone or any single family or multiple family residential use.
>
> One mile of any public or private school.
>
> One thousand feet (1,000') of any church or other religious facilities or institution.
> One thousand feet (1,000') of any public park or P-1 (Public District) zone.

(3) In December of 1981 or January 1982, Defendant Kukio Bay Properties, Inc. ("Kukio") entered into an agreement to purchase the Roxy Theater and the Renton Theater which are located across the street from each other in downtown Renton. The theaters were purchased with

the intention of leasing the same to Playtime Theatres, Inc. ("Playtime") the operating company which intended to use the premises for the purpose of exhibition of adult motion picture films. Both Kukio and Playtime are owned by a single shareholder, Roger H. Forbes.

(4) On January 20, 1982, six (6) days prior to the closing of the purchase of the theaters, Playtime and Kukio filed an action in the United States District Court for the Western District of Washington at Seattle entitled "Complaint for Declaratory Judgment and Preliminary Injunction", alleging federal jurisdiction under 28 U.S.C. Section 1131(a), 42 U.S.C. Section 1983, 28 U.S.C. Section 2202, and Rule 57 of the Federal Rules of Civil Procedure, challenging the constitutionality of Ordinance No. 3526.

(5) On January 29, 1982, Kukio and Playtime brought on their motion for a temporary restraining order seeking a restraint against enforcement of the ordinance which motion was denied by United States District Judge Walter T. McGovern based upon a report and recommendation of Magistrate Phillip K. Sweigert.

(6) On February 9, 1982, Playtime and Kukio filed and served a new complaint entitled "Amended and Supplemental Complaint for Declaratory Judgment and Preliminary and Permanent Injunction" which complaint raised a new issue under the zoning ordinances of the City of Renton that a conditional use permit must be obtained prior to the opening of an adult motion picture theater. This allegation was made despite the fact that at the hearing on

the motion for temporary restraining order on January 29, 1982, David R. Clemens, Director of Policy Planning of the City of Renton, had testified to a contrary administrative interpretation; that is that an adult motion picture theater was a permitted use under the zoning ordinance as administered by the City of Renton, subject only to separation from the uses specified in Ordinance No. 3526.

(7) On February 19, 1982, the City of Renton filed a civil action in this court seeking a Declaratory Judgment that Ordinance No. 3526 was constitutional as applied to the proposed use of the Renton Theater as an adult motion picture theater.

(8) On February 22, 1982, the City of Renton filed in the United States District Court a motion to Dismiss the

amended and supplemental complaint filed in federal court based upon the filing of the action in the State Court for a Declaratory Judgment to resolve the controversy between the City of Renton and Playtime and Kukio. The City argued, based upon a line of Supreme Court cases, that where a city ordinance is constitutional on its face and the civil rights issue involves important state civil interests, the federal claim must be presented to the state court in the first instance where that forum was available and the State had not waived its right to have the matter resolved in the state court. The City further argued that the state judiciary must be presented with an opportunity to consider and interpret the city ordinance and, if necessary, invoke a limiting construction because the federal courts lacked

jurisdiction authoritatively to construe state legislation. Therefore, the federal complaint should be dismissed for failure to state a claim upon which federal relief could be granted based upon "abstention" grounds. The Federal court declined to dismiss the federal lawsuit holding that abstention was not appropriate. Judge McGovern filed his order denying the City of Renton's Motion to Dismiss based upon the report of the Magistrate on May 5, 1982.

(9) On March 8, 1982, Playtime and Kukio filed a petition to remove the state court action to federal court. Thereafter on March 12, 1982, the City of Renton filed its objections to removal and Motion to Remand the state declaratory judgment action back to the state court.

(10) On March 18, 1982, Playtime and

Kukio filed a Motion to Dismiss the declaratory judgment state action which had been removed to the federal court. On April 9, 1982, the City of Renton's Motion to Remand and Playtime and Kukio's Motion to Dismiss the state court action came on for hearing before Magistrate Sweigert. At the conclusion of the hearing, the Magistrate stated in an oral opinion from the bench that the state court action should be remanded and declined to dismiss the action. However, the actual Order remanding the state action back to the state court was not entered until January 13, 1983.

(11) On May 3, 1982, the City Council of the City of Renton enacted Ordinance No. 3629 which amended Ordinance 3256 to incorporate the meaning which the City had argued could be given to the ordinance by a state court. A

copy of Ordinance No. 3629 is attached as Attachment "B" hereto and by this reference incorporated herein. The principal changes were;

(A) the amending ordinance contained an elaborate statement of the reasons for enactment of both Ordinance No. 3526 and Ordinance No. 3629;

(B) a definition of the word "used" was added to further restrict the applicability of the ordinance. The amendment provided that an "adult motion picture theater use" must be a continuing course of conduct of exhibiting "specified sexual activites" and "specified anatomical areas" in a manner which appeals a tc prurient interest.

(C) violation of the use provisions of the ordinance was declared to be a nuisance per se to be abated by a civil

action and not by criminal enforcement;

(D) the required distance of an adult theater from a school was reduced from one mile to one thousand (1,000') feet; and

(E) a severability clause was added. The amending ordinance, also contained an emergency clause and was to be effective as of the date of its passage and approval by the mayor.

(12) On May 4, 1982, the City of Renton filed a renewed Motion for Dismissal, and on May 27, 1982 a Motion for Summary Judgment under F.R.C.P. Rule 56.

(13) On June 14, 1982, the City Council of the City of Renton enacted a third Ordinance No. 3637 which was identical to Ordinance No. 3629 in all respects except that the emergency clause was deleted and the ordinance was to be

effective thirty (30) days following its publication. A copy of Ordinance No. 3637 is attached as Attachment "C" and by this reference incorporated herein.

(14) On June 23, 1982, U.S. Magistrate Sweigert heard City of Renton's renewed Motion to Dismiss and its Motion for Summary Judgment, as well as the Playtime and Kukio Motion for Preliminary Injunction requesting restraint of the enforcement of the ordinances pending the disposition of the litigation. On November 5, 1982, Magistrate Sweigert filed his report and recommendation recommending denial of the City of Renton's Motion to Dismiss and Motion for Summary Judgment, and the granting of a Preliminary Injunction pending the conclusion of the litigation. On January 13, 1983, Judge McGovern entered an order approving the report and

recommendation of the Magistrate.

(15) From January 27, 1982 through January 19, 1983, Defendant Playtime Theatres, Inc. had operated both the Roxy Theater and the Renton Theater as general release motion picture theaters. However, on January 20, 1983, Defendant Playtime Theatres, Inc. commenced showing sexually explicit films at the Renton Theater and has continuously exhibited sexually explicit films since that date. A list of the films exhibited and the dates of exhibition are pleaded at paragraph 13, page 6, line 20, through page 7, line 15 of the First Amended and Supplemental Complaint filed herein by the Plaintiffs. Representative depictions of the content of a portion of the films exhibited since that date are compiled as Time and Motion Studies attached as attachments to the

Declarations of Robert S. Perry and Robert McGuire which are filed herein. Those declarations describe the manner in which the Time and Motion Studies are prepared based upon surveillance of the actual films exhibited at the theater. The Time and Motion Studies are part of the material returned from the Federal Court on the Second Remand Hearing and are filed under Subnumber 30 in the court file herein.

(16) On February 18, 1983, Judge McGovern entered his final order in the federal court reversing his previous decision to grant the Preliminary Injunction, and finding that the Renton Ordinance No. 3526, as amended, was constitutional. On April 29, 1983, Judge McGovern entered an order denying Playtime and Kukio's motion to alter or amend the final order, and further

denying a requested stay of the final order pending appeal of the order to the Ninth Circuit Court of Appeals.

(17) On May 19, 1983, the Plaintiffs filed their First Amended and Supplemental Complaint in this cause. The amended complaint added additional allegations and causes of action alleging the maintenance by the Defendants of a public nuisance at the Renton Theater by reason of the exhibition of sexually explicit and obscene motion picture films in violation of the provisions of the City of Renton's zoning code and state law. Plaintiffs further filed a Motion for Preliminary and Permanent Injunction, which motion was noted for hearing in this court on June 13, 1983. The object of the motion was to restrain the Defendants from use of the Renton Theater as an adult motion picture theater in

violation of the City of Renton's zoning code.

(18) In response to the public announcement that the City of Renton intended to file an amended complaint in the state court action, Kukio and Playtime filed their application in the Ninth Circuit Court of Appeals for a stay of the final order of Judge McGovern, which application was denied by a panel of the Ninth Circuit Court of Appeals by order filed on June 13, 1983. The order in its entirety reads as follows:

> "Appellants' motion for a stay or injunction pending appeal is denied. Appellants have failed at this time to establish the requisite balance of hardship and likelihood of success on appeal to warrant relief requested." (Citation omitted).

(19) On June 3, 1983, the Defendants once again filed a petition for removal seeking to remove this state court action

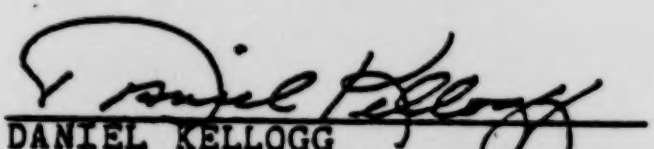
to federal court. Plaintiffs immediately filed objections to removal and Motion for Remand, which motion was heard before Judge John C. Coughenour on June 16, 1983. At the conclusion of the hearing, the federal court entered its order remanding the state court action to this court based upon a want of federal jurisdiction---the identical conclusion of Judge McGovern on the prior remand. However, the Defendants' improper removal of the state court action without federal jurisdiction did have the effect of disrupting the hearing set for the Plaintiffs' Motion for Preliminary Injunction on June 13, 1983. Following remand, that motion was reset by the Plaintiffs for July 11, 1983.

(20) On June 20, 1983, Defendant Playtime Theatres, Inc., filed its motion requesting dismissal of Plaintiffs' first

cause of action for declaratory relief, and its motion for dismissal of all sections of Plaintiffs' amended complaint which rely upon RCW 7.48.050-.100, both motions which were based upon CR 12(b)(6) alleging failure to state a claim upon which relief can be granted.

DATED: June 24, 1983.

Respectfully submitted,



DANIEL KELLOGG
of Attorneys for Plaintiffs

APPENDIX "C"

Copy of U.S. District Judge Robert J. McNichols Order of Oct. 28, 1983 in Playtime Theatres, Inc. v. The Honorable Kenneth Eikenberry, et al., No. C-82-239 and Spokane Arcades, Inc., et al. v. Honorable Dixie Lee Ray, etc., et al., No. 77-353 which enjoined the City of Renton regarding its actions taken pursuant to Initiative Measure No. 335 and H.B. 626.

(Reference: Amicus Curiae Brief at page 5, footnote 2)

C-1 through C-13

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PLAYTIME THEATRES, INC., a Washington corporation, Plaintiff, v. THE HONORABLE KENNETH EIKENBERRY, etc., et al., Defendants.	)	NO. C-82-239
SPOKANE ARCADES, INC., a Washington corporation; et al., Plaintiffs, v. HONORABLE DIXIE LEE RAY, etc., et al., Defendants.	)	NO. C-77-353 ORDER

In November of 1977, the voters of the State of Washington adopted Initiative 335, a moral nuisances act aimed primarily at pornography. This statute, codified at RCW Section 7.48.050-.100 & .900, was struck down by this Court as facially invalid in Spokane

Arcades v. Ray, 449 F.Supp. 1145 (E.D. Wash. 1978), aff'd sub nom. Spokane Arcades v. Brockett, 631 F.2d 135 (9th Cir. 1980), aff'd 454 U.S. 1022 (1981). The initiative was thereafter declared invalid in toto by reason of an inadequate ballot title. State v. Charboneau's, 27 Wn.App. 5, 615 P.2d 1321, rev. denied, 94 Wn. 2d 1021 (1980).

In April of 1982, the legislature passed HB 626, an apparent substitute for the then-defunct initiative. This legislation, codified at RCW ch. 7.48A, was tested for constitutionality in this Court and found valid in all respects.[1/] Spokane Arcades v. Eikenberry, 544 F. Supp. 1034 (E.D. Wash. 1982) appeal

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1. The Court was concerned primarily with federal questions, recognizing that it lacked authority to definitively construe the state issues presented. Specifically reserved was any ruling on whether the Act was impermissibly passed as an emergency measure.

pending. Despite the finding that the Act was constitutionally unobjectionable, enforcement actions continued to be enjoined pending completion of the appellate process.[2/]

In May of 1983, the City of Renton (City) brought an action in a state court seeking abatement of moral nuisances allegedly maintained by Playtime as well as imposition of penalties. Five causes

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2. Some explanation of the nature of this injunction is in order. Shortly after commencement of the action, an injunction pendente lite was entered. After the decision had been rendered, plaintiffs sought a stay pending appeal. The Court entered a limited stay designed to allow the parties an opportunity to petition the Circuit. The net effect, as intended by the Court and understood by all counsel, was to maintain the effectiveness of the injunction previously entered. The Circuit thereafter extended the "stay or injunction . . . during the pendency of this appeal." Concedely, the draftsmanship of all three orders referenced leaves something to be desired and the City, as a non-party, cannot be faulted for misconstruing the procedural posture of the case. For that reason, Playtime's motion for a contempt order will be denied.

of action were stated. Two were based on the City's zoning ordinances and the other three on RCW chs. 7.48 and 7.48A. Playtime now seeks an injunction from this Court enjoining maintenance of the state action.

Initiative 335:

To briefly restate the parties' respective positions, Playtime argues that the foregoing scenario is wholly implausible and that a statute which, after the full panoply of appellate process, has been declared invalid by both federal and state courts, cannot possibly serve as a basis for the subject litigation. The City contends that only a state court can authoritatively construe state legislation, and that the initiative can be "revived" by an appropriate judicial narrowing construction. Both sides have colorable positions.

As an initial proposition, this Court has jurisdiction to enjoin a state proceeding only under tightly delineated circumstances:

> A Court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. Section 2283.

Having concluded that enforcement of Initiative 335 would be violative of constitutionally protected interests, it becomes almost axiomatic that this Court has authority to "effectuate its judgment" pursuant to the All Writs Act codified at 28 U.S.C. Section 1651. To state the obvious, the judgment of this Court, the Circuit, and the Supreme Court would be a meaningless exercise in futility unless there exists some means of giving force to that judgment. Judge Fitzgerald was asked to supply the

requisite force by enjoining prosecution. He declined to do so on the belief that "responsible state officers involved in this action will not prosecute under an unconstitutional statute." Spokane Arcades, supra, 449 F.Supp. at 1158. By now enjoining the subject action, this Court would be doing no more than it would have done at the time Spokane Arcades was decided had it not entertained this belief.

The City argues, however, that a narrowing construction of the initiative may well remove the perceived constitutional defects.[3/] Since only state courts are capable of such a construction, then it follows that the right exists to present the matter to an

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3. The Ninth Circuit felt that no such narrowing construction would be possible. 631 F.2d at 137. No less a scholar than the Chief Justice, however, believes to the contrary. 454 U.S. at 1123-24 (Burger, J., dissenting).

appropriate court for determination. Dombrowski v. Pfister, 380 U.S. 479, 491 n.7 (1965). This position is also well-taken, and in a proper case, principles of comity would dictate that this Court refrain from interferring with the state's ability to so function. Cf., Metromedia, Inc. v. San Diego, 453 U.S. 490 521 n.26 (1981) and authorities cited therein.

The basic infirmity in the City's approach is that it not only wants the initiative construed, but also concurrently enforced. The Court in Dombrowski, supra, faced an analogous situation. There it was held that a narrowing construction:

> cannot be satisfactorily done through a series of criminal prosecutions, dealing as they inevitably must with only a narrow portion of the prohibition at any one time, and not contributing materially to articulation of the statutory standard. We believe that those affected by a statute are entitled to be free of the burdens

> of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood, of obviating similar uncertainty for others. Here, no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution, and appellants are entitled to an injunction. The State must, if it is to invoke the statutes after injunctive relief has been sought, assume the burden of obtaining an permissible narrow construction in a noncriminal proceeding before it may seek modification of the injunction to permit future prosecutions.

380 U.S. at 491 (footnotes omitted).

This analysis is instructive. While not as onerous as a criminal prosecution, the relief sought in the subject ation is by no means inconsequential. Persons in Playtime's position should be "free of the burdens of defending prosecutions" until such time as the state has met its "burden of obtaining a permissible narrow construction." Washington has an appropriate vehicle for testing the initiative independently of an

enforcement action in the form of the Uniform Declaratory Judgments Act codified at RCW ch. 7.24. This is precisely the vehicle approved in Dombrowski, Id. at 491 n.6.

Accordingly, an injunction will be entered prohibiting the City from pursuing any prosecution based in whole or in part on Initiative 335. The City will not be precluded from maintaining an action which seeks only declaratory relief as to the statute's validity.[4/]

HB 626:

Whether HB 626 can serve as a basis for the subject ation presents a much clearer picture. Prosecution under the

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4. Frankly, it is difficult to follow the City's argument that Charboneau's, supra, has not already fully and finally resolved any issue of the initiative's viability by declaring it unconstitutional as a matter of state law. Be that as it may, the posture of these proceedings dictate that this Court defer to a state determination of that issue.

Act has been enjoined. Note 2, supra. That injunction, imposed by the Circuit, will be enforced. The City argues that it was not a party and thus not bound by any order emanating from either this Court or the Circuit until such time as it submitted to jurisdiction after the state action had been commenced. Therefore, it is argued, the Court is precluded from extending the terms of the injunction under the rule set forth in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). Huffman has been read to stand for a wide variety of propositions, but the interpretation this Court is required to follow is that rendered by the Ninth Circuit.

> [U]nless "vital state interests" are at stake, federal district courts are not proscribed from interferring with ongoing state proceedings when necessary to vindicate federally protected civil rights.

Miofsky v. Superior Ct. of St. of

California, 703 F.2d 332, 338 (9th Cir. 1983).

With the Attorney General of the State of Washington already unquestionably subject to the injunction, it is difficult to characterize the City of Renton's local activities as rising to the type of "vital state interests" contemplated in Miofsky, supra. Adding a unique twist to the instant matter is the fact that this Court has concluded HB 626 to be constitutionally valid. Thus, one might reasonably argue, interference "with ongoing state proceedings [is not] necessary to vindicate federally protected" rights. The easy answer is that the instant injunction exists by order of the Circuit. This Court has no authority to question the propriety of its issuance and must assume that the Circuit adhered to its own well-established criteria in determining

whether injunctive relief was appropriate. As was the case in connection with Initiative 335, of course, the City will be free to maintain an action which seeks only declaratory relief. See 544 F. Supp. at 1049.

THEREFORE IT IS ORDERED:

(1) Playtime's motion for a finding of contempt on the part of the City is DENIED.

(2) The City of Renton, its servants, agents, employees, and others acting under its direction and control is hereby enjoined from enforcing or executing and/or threatening to enforce or execute the provisions of Initiative Measure 335 in whole or in part, or the provisions of House Bill 626 in whole or in part; except that nothing herein shall preclude the persons and entities so enjoined from maintaining a declaratory judgment action independently of any

enforcement proceedings.

DONE BY THE COURT this 28th day of October, 1983.

Robert J. McNichols
Robert J. McNichols
United States
District Court

APPENDIX "D"

Copy of King County Superior Court Judge Robert M. Elston's Order Denying Defendants' Second Motion for Dismissal Dated June 29, 1983 under CR 12(b)(6) in City of Renton, et al. v. Playtime Theatres, Inc., et al., in the Superior Court of Washington for King County.

(Reference: Amicus Curiae Brief at page 5, footnote 3)

D-1 through D-3

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CITY OF RENTON, a municipal corporation; LAWRENCE J. WARREN, City Attorney of the City of Renton; STATE OF WASHINGTON, ex rel. LAWRENCE J. WARREN, City Attorney of the City of Renton, Plaintiffs, v. PLAYTIME THEATRES, INC., a Washington corporation; KUKIO BAY PROPERTIES, INC., a Washington corporation; ROGER H. FORBES and JANE DOE FORBES, husband and wife, ROBERT B. McRAE and ELIA C. McRAE and DOES 1 THROUGH 10, Defendants.	NO. 82-2-02344-2 ORDER DENYING DEFENDANTS' SECOND MOTION FOR DISMISSAL DATED June 29, 1983 UNDER CR 12(b)(6)

THIS MATTER having come on regularly for hearing upon the motion of Defendants for dismissal of all sections of Plaintiffs' Complaint which rely upon RCW Chapter 7.48A, and each and every claim and prayer of Plaintiffs' Complaint which seeks equitable or injunctive relief,

both based upon an allegation of a failure to state a claim upon which relief may be granted under CR 12(b)(6), or alternatively, for an order staying the proceedings herein pending final disposition in the United States Court of Appeals for the Ninth Circuit in Cause Numbers 82-3441 and 82-3442, the Plaintiffs being represented by DANIEL KELLOGG of Warren & Kellogg, P.S., Attorneys at Law, and JAMES J. CLANCY, Attorney at Law, and Defendants being represented by JACK R. BURNS of Burns & Meyer, P.S., Attorneys at Law, and the Court having considered the records and files herein, and memoranda of authority in support of Defendants' motion, and the statement of facts previously submitted herein by the Plaintiffs and the memorandum of authority submitted by the Plaintiffs in opposition to Defendants' motion, and the Court having heard the

argument of counsel, and being fully advised in the matter.

NOW, THEREFORE, it is Ordered as follows:

1. Defendants' Motion for Dismissal dated June 29, 1983, which requests the relief as more particularly stated above, is denied.

DATED: July 7, 1983.

/s/ROBERT M. Elston
Judge

Presented by:

Daniel Kellogg
of Warren & Kellogg, P.S.
Attorneys for Plaintiffs

(12) (12)

Office-Supreme Court, U.S.
FILED
NOV 15 1984
ALEXANDER L. STEVAS,
CLERK

Nos. 84-28 and 84-143

In The

Supreme Court of the United States

October Term, 1984

No. 84-28

DONALD C. BROCKETT,
Spokane County Prosecuting Attorney
Appellant,

vs.

SPOKANE ARCADES, INC., et al.,
Appellees,

No. 84-143

KENNETH EIKENBERRY,
Attorney General for the State of Washington, et al.,
Appellants,

vs.

J-R DISTRIBUTORS, INC., et al.,
Appellees,

On Appeal From The United States
Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF TOM COLLINS, AS COUNTY ATTORNEY FOR THE COUNTY OF MARICOPA, STATE OF ARIZONA, IN SUPPORT OF APPELLANTS

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INTEREST OF THE AMICUS CURIAE

Your amicus curiae is the Honorable Tom Collins, duly elected County Attorney for Maricopa County, Arizona. He is the chief law enforcement officer of the County, with criminal jurisdiction over felonies and misdemeanors as well as civil practice and advice duties to County governmental agencies.

There are approximately forty-five (45) so-called "adult" bookstores and theatres which carry exclusively "hard-core" pornographic magazines, films, video cassettes, sexual devices such as dildos and bondage equipment, and silent short-film "peep shows" in small booths. In addition, several "adult" motels offer hard-core films to paying customers, numerous video cassette rental and sales outlets carry hundreds of hard-core pornographic cassettes, and several bars and burlesque houses employ

young females to expose their vagina and anus areas and breasts to paying customers. All such hard-core pornography and nude "entertainments" are illegal under Arizona state statutes. Prosecutions, injunctions, and nuisance abatement actions have been brought and continue to be litigated in state courts.

The diversity of opinion by lower federal and state courts deserves correction as we enter a new era of enforcement against an illegal organized crime industry which has grown out of control and now enters the home through cable and pay television, dial-a-porn telephone services, and "men's sophisticate magazines" available at nearly every corner convenience store and newsstand. Sexual crimes against women and children are among the only classifications of crimes which are steadily increasing, and are becoming

more violent and bizarre. In the opinion of veteran law enforcement officers and many researchers and therapists, such sex crimes are increasingly connected with pornography and its effect on heightening the arousal and deviant tendencies of offenders. This nationwide problem cannot be ignored, yet state prosecutors are now being diverted from their law enforcement response by lawsuits from the pornography industry in federal courts. Attacks against new and existing statutes and ordinances are resulting in the review of state laws by federal judges rather than state courts. Awards of attorneys fees whenever a federal judge differs in opinion with the choice of words in legislation are intimidating city and county councils and state legislatures, who are faced with mounting financial problems on one hand and

growing organized crime and related individual offenses on the other.

Your amicus curiae has recently been the subject of a similar federal challenge to the existing Arizona Obscenity Statutes, brought on behalf of several pornographers by the same attorney representing the Appellees in this case. The Complaint in Polykoff, et al. v. Tom Collins, ___ F.Supp. ___ CIV 84-1101, was filed in the U.S. District Court in Phoenix and asked that the Court declare the state statutes invalid, primarily in reliance upon the Ninth Circuit opinion now before the Court here, and sought an injunction under 42 U.S.C. 1983, and attorneys fees under Section 1988. Your amicus curiae immediately filed a civil declaratory action regarding the challenged statutes in the state court against the federal plaintiffs. (The federal plaintiffs-

state defendants objected and moved to dismiss the state action, which was subsequently dismissed over our objection after the federal court ruled in the State's favor.) The Honorable District Judge Charles L. Hardy assumed jurisdiction but entered judgment, on July 11, 1984, in favor of the State and your amicus curiae. Judge Hardy first found that abstention was not required and then distinguished the Ninth Circuit decision from the statute and case law construction by the Arizona Supreme Court. See Appendix "A" for the District Court decision of Judge Hardy. Judge Hardy found that the Arizona Supreme Court's interpretation of "prurient" and the provision of high fine limits under Arizona's felony obscenity law were constitutional. The Plaintiffs have filed an appeal from this judgment in the

Ninth Circuit, where the case is now pending, Case No. 84-2328.

Clarifying the steps in determining jurisdiction, in considering abstention, declaratory relief, and then injunctive relief, would eliminate much improper litigation of these state law issues and restore proper deference to state courts. Your amicus curiae, being faced with the duty to enforce state laws and the burden of defending such federal lawsuits, has an interest in the resolution of these issues of federal review and substantive obscenity law questions. This case will be the most important obscenity case since Miller, and could be the most significant statutory review case ever.

Your amicus curiae hereby offers a summary of existing case law and proposals for future guidance in the resolutions of these controversies.

SUMMARY OF ARGUMENT

I. Federal Courts Lack Jurisdiction To Review State Laws Unless They Meet The Watson v. Buck Test Of Total Invalidity Incapable Of Narrowing Construction, Either Facially Or As Applied.

II. Federal Courts Should Abstain From Exercising Jurisdiction Over Declaratory Or Injunction Claims Unless It Is First Pleaded And Proved That State Procedures Are Inadequate To Provide Due Process Or That There Is Bad Faith Or Harassment.

III. Even Where Declaratory Relief Is Appropriate, Federal Courts Must Still Consider Injunctive Claims Separately And An Injunction Should Issue Only Where There Is Evidence

That The Federal Declaratory Order Will Be Ignored In Bad Faith.

IV. The Concept Of Prurient Appeal Is Not Limited To Appeal To A "Shameful And Morbid" Sexual Interest And Properly Includes The Commercial Appeal To Erotic, Lustful, And Otherwise Attractive, As Well As Repulsive, Sexual Interests.

V. The Penalty Provisions Of The Washington Statute Are Not Unreasonable On Their Face And Can Be Applied Constitutionally.

LAW AND ARGUMENT

Proposition of Law Number I:

> Federal Courts Lack Jurisdiction To Review State Laws Unless They Meet The Watson v. Buck Test Of Total Invalidity Incapable Of Narrowing Construction, Either Facially Or As Applied.

In Watson v. Buck, 313 U.S. 387, at 401-02 (1941), the Court refused federal review of Florida statutes because there were no "exceptional circumstances", no "great and immediate" danger of irreparable loss, and the "Florida Supreme Court, which under our dual system of government has the last word on the construction and meaning of statutes of that state, has never yet passed upon the statutes before us. It is highly desirable that it should have an opportunity to do so." The Court's reasoning for deferring to state courts is more applicable and needed now than it

was in years past: "Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case." Id., at 402.

The Court then announced, at 402, an exception to this rule which, amicus submits, should be the primary threshold question in determining federal jurisdiction to consider declaratory claims:

> It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.

The Ninth Circuit below, in J-R Distributors v. Eikenberry, 725 F.2d 482,

at 487, concluded that facial challenges to state statutes need not involve "substantial" overbreadth "in the area of first amendment rights", citing its decision in Stroianoff v. Montana, 695 F.2d 1214, 1218 (9th Cir. 1983), and thereby distinguishing Broadrick v. Oklahoma, 413 U.S. 601 (1973). The Ninth Circuit, at 487, also distinguishes Village of Hoffman Estates v. Flipside, 455 U.S. 489, 494 (1982), by concluding that such overbreadth rules only apply to conduct and not "pure speech".

Amicus submits that obscenity statues are not "pure speech" regulations, as are political or religious dialog or verbal expression cases. As held in People v. Souter, 178 Cal.Rptr. 111 (Ct. App. Cal. 1981), paying actors and actresses to engage in explicit sex acts before a camera in order to produce pornography is a

violation of prostitution and pimping statutes. The distribution of such hard-core pornography is therefore exploiting the work of prostitutes, and is at least a mixture of conduct and speech. Modern hard-core pornography should not be elevated to the protected class which political, racial, and religious expression deserves. In the obscenity law area, the rule of substantial overbreadth should apply, as stated in Watson v. Buck, supra, and as this Court stated in Hoffman Estates, 455 U.S., at 494-95. This Court then stated, in Footnote 5, that:

> 5. A "facial" challenge, in this context, means a claim that the law is "invalid in toto--and therefore incapable of any valid application."

The primary threshold question for any court before whom a lawsuit has been filed involves the inherent jurisdiction to determine jurisdiction. In this

regard, whether the state statute being attacked is new or existing, the federal court should first determine whether it meets the test of Watson v. Buck, 313 U.S., at 402 (1941).

A review of the challenged statute by this rule, to determine whether it is totally unconstitutional under any circumstances or at least incapable of constitutional application to the complaining parties or under the circumstances alleged, would involve the federal courts only in those situations where a state law is so vague or overbroad that it has no meaning whatsoever or encompasses clearly protected conducted or speech. If the statute under consideration is not so totally repugnant to constitutional guarantees that it could not be narrowly construed by the state courts, then the federal courts should leave to the state

courts the determination of the validity and application of such statutes. In this instance the federal courts could best be guided by the abstention principles of Railroad Commission v. Pullman, 312 U.S. 496 (1941), if it is a new statute, and by the principles of Dombrowski v. Pfister, 380 U.S. 479 (1965), and Steffel v. Thompson, 415 U.S. 452 (1974), if it is an existing statute. If the federal court is not faced with such a totally invalid statute, it should determine that it has no jurisdiction to review such a state law and immediately dismiss the case for failure to state a claim under either the Declaratory Judgment Act or the Civil Rights Act. Fenner v. Boykin, 271 U.S. 240, at 244 (1926). See also: Vicory v. Walton, 721 F.2d 1062, at 1065-66 (6th Cir. 1983), cert. denied, ___ U.S. ___, 53 L.W. 3237, No. 83-2111 (Oct. 1, 1984).

In the obscenity case now before this Court, the new Washington statute could not be said to be "incapable" of a narrowing construction, either as it defined "prurient" or as it provided for penalties. Obscenity laws have been perhaps the most often construed and interpreted of all statutes. The role of this Court in defining the basic "test" for both federal and state courts has resulted in a response by the courts to construe old statutes in light of the latest pronouncements. See: Kingsley Pictures v. Regents, 360 U.S. 684, at 688 (1959); Mishkin v. New York, 383 U.S. 502, at 507-08, 510-11 (1966); U.S. v. 37 Photographs, 402 U.S. 363 (1971); Miller v. California, 413 U.S. 15, at 25 (1973); Ward v. Illinois, 431 U.S. 767, at 772-73 (1977); and New York v. Ferber, ___ U.S. ___, 73 L.Ed.2d 1113 (1982).

Many state courts have a history and willingness to interpret state laws to conform with case law, and in these states the federal courts cannot say that narrowing constructions are not possible or that state declaratory or criminal actions cannot adequately protect constitutional rights. See: State of Washington v. J-R Distributors, 512 P.2d 1049 (Sup.Ct.Wash. 1973) (construing obscenity statute); State of Arizona v. Bartanen, 591 P.2d 546, at 550-52 (Sup.Ct.Ariz. 1979) (defining "prurient"); State of Arizona v. Book-Cellar, 679 P.2d 548 (Ct.App.Ariz. 1984) (construing and upholding obscenity nuisance statute); State of Ohio v. Burgun, 56 Ohio St.2d 354, 384 N.Ed.2d 255 (Sup.Ct.Ohio 1978) (construing criminal obscenity statute), approved and followed in Sovereign News v. Falke, 674 F.2d 484 (6th Cir. 1982), cert. denied,

74 L.Ed.2d 120 (1982), and in Turoso v. Cleveland Municipal Court, 531 F.Supp. 829 (N.D. Ohio 1980), aff'd., 674 F.2d 486 (6th Cir. 1982), cert. denied, 74 L.Ed.2d 145 (1982); State of Ohio, ex rel. Ewing v. "Without a Stitch", 37 Ohio St.2d 92, 307 N.E.2d 911 (Sup.Ct. Ohio 1974) (construing obscenity nuisance statute), affirmed sub nom Art Theatre Guild v. Ewing, 421 U.S. 923 (1975) (by dismissal f.w.o.s.f.q.); State of Idaho, ex rel. Kidwell v. U.S. Marketing, 631 P.2d 622 (Sup.Ct. Idaho 1981) (upholding obscenity nuisance statute and closure remedy), jurisdiction noted, 454 U.S. 1140 (Jan. 11, 1982), appeal dismissed by Appellant- U.S. Marketing over State-Appellee's objection, 455 U.S. 1009 (March 10, 1982); Chateau X v. North Carolina, 250 S.E.2d 603, remanded at 445 U.S. 947, reaffirmed at 275 S.E.2d 443 (Sup.Ct. N.C. 1981) (upholding obscenity

nuisance statute), approved and followed in Fehlhaber v. North Carolina, 675 F.2d 1365 (4th Cir. 1982); People of Michigan v. Neumayer, 275 N.W.2d 230 (Sup.Ct. Mich. 1979) (construing criminal obscenity statute); First Amendment Foundation v. State of Florida, 364 So.2d 450 (Sup.Ct. Fla. 1978) (construing criminal obscenity statute).

Therefore, the Ninth Circuit's decision that the federal court has jurisdiction simply because the plaintiff chose that forum, and struck the entire statute and is willing to enjoin all law enforcement in the state because the legislature included "lustful" as one of the adjectives for prurient, is unconscionable and unreasonable as an intrusion into state powers and judicial functions. Especially is this so since the adjective "lustful" was given to obscenity law by this Court in Roth v.

United States, 354 U.S. 476, at 487, fn.20 (1957), and this Court has specifically approved "erotic" and other "attractive" descriptions of the concept of prurience. See: Ginzburg v. United States, 383 U.S. 463, at 470 (1966); Mishkin v. New York, 383 U.S. 502, at 508-09 (1966); Miller v. California, 413 U.S. 15, at 18, fn.2 (1973); Hamling v. United States, 418 U.S. 87, at 127-31 (1974); Pinkus v. United States, 436 U.S. 293, at 301-03 (1978). See also: Mutual Film Corp. v. Industrial Com., 236 U.S. 231, at 242 (1915), cited in footnote 20 of Roth, supra at 487.

The Ninth Circuit not only should not have concluded that the law was totally invalid, but its ruling on prurient was directly contrary to historical authority on the concept of prurience. Had it followed the Watson v. Buck test, it would have had no choice

but to find a lack of federal jurisdiction to review the Washington statute. Amicus submits that therein lies the error in the ruling under review.

Proposition of Law Number II:

> Federal Courts Should Abstain From Exercising Jurisdiction Over Declaratory Or Injunction Claims Unless It Is First Pleaded And Proved That State Procedures Are Inadequate To Provide Due Process Or That There Is Bad Faith Or Harassment.

Assuming that a federal court finds that it is faced with a challenge against a statute which meets the test of Watson v. Buck, supra, the court's next determination should be whether declaratory relief is appropriate or whether the federal court should abstain from entertaining a declaratory action. In this regard, the federal court should look to the procedures for testing state

statutes which are available in the state court system, including the availability of a state declaratory judgment action as well as the existence of prompt and valid procedures for testing conduct under these statutes in criminal or other civil proceedings. Allen v. McCurry, 449 U.S. 90, at 100-01 (1980). If state procedures are inadequate to provide due process to the federal plaintiffs, the federal court will then find itself in a position of being the only forum capable of determining the validity of the statute and issuing a declaratory judgment thereon. If the state procedures, civilly or criminally, are adequate and available to the federal plaintiff, the federal court should then look to see whether there is evidence of bad faith or harassment on the part of the prosecution or law enforcement officers. If it is evident that the

federal plaintiffs will not be dealt with in good faith by the local agencies, as in Dombrowski, supra, then the court is again faced with a situation where it must step in to protect the federal plaintiff. If the federal court does not find that state procedures are inadequate, or that if adequate would be enforced in bad faith, the court should abstain and dismiss the action. This would be consistent with this court's discussion in Younger v. Harris, 401 U.S. 37, at 46-49 (1971), stating that facing a good faith prosecution or the existence of a chilling effect on First Amendment rights, even under an invalid law, is not sufficient reason for the application of the substantial power of federal jurisdiction.

Although the Court in Steffel, supra, rejected the stricter Younger rules for declaratory actions where no

state case was pending, and held that irreparable harm need not be shown, the reasoning of Steffel is no longer applicable to modern federal-state litigation and this Court should return to the rule of Railroad Com. v. Pullman, supra, especially where a new state law is challenged.

Where state criminal or civil proceedings are pending, or commenced before proceedings of substance are reached in the federal court, there are strict burdens which must be met before a federal court can consider either injunctive or declaratory relief in reviewing a state statute. Younger v. Harris, 401 U.S. 37, at 46 (1971), Samuels v. Mackell, 401 U.S. 66, at 73 (1971), Hicks v. Miranda, 422 U.S. 332, at 349 (1975). Where there is no state criminal or civil action pending, but is threatened or at least likely, federal

intervention might be permissible to consider declaratory relief, but the injunctive relief would still require satisfaction of equitable principles, extraordinary circumstances, and deference to federalism. Steffel v. Thompson, 415 U.S. 452, at 468-69, 475 (1974), Zwickler v. Koota, 389 U.S. 241, at 254 (1967), Douglas v. City of Jeannette, 319 U.S. 157, at 162-64 (1943). Although Steffel was decided at a time when the Court, at 462, stated that considerations of federalism have little vitality when no state proceeding is pending, such a situation no longer exists. Steffel discusses, at 465-68, the "storm of controversy" between federal and state jurisdiction which led to the establishment of the three judge district court system and the enactment of the Declaratory Judgment Act. In 1976, however, the three judge court

provision was repealed and a single federal judge was again empowered to enjoin the enforcement of state law. This development was obviously undertaken because of the strong statements in favor of abstention and respect for the state court system which had developed in the long line of abstention cases where this Court has stated that federal courts should not be the primary arbitors of the language or application of state laws. The continuing vitality of Younger v. Harris, supra, Huffman v. Pursue, 420 U.S. 592 (1975), and Railroad Commission v. Pullman, supra, should have safeguarded the state's rights to enact and enforce statutes and ordinances. Even though this Court has reaffirmed the principles of federalism and abstention in such recent cases as Moore v. Sims, 422 U.S. 415 (1979), Allen v. McCurry, 449 U.S. 90 (1980), and Parratt v.

Taylor, 451 U.S. 527 (1981), and has attempted to restrict and clarify the application of the Civil Rights Statute under Section 1983, these principles are now widely ignored by the lower federal courts. The U.S. Court of Appeals for the Ninth Circuit, in the opinion now under consideration, J-R Distributors, supra at 486-88, now holds that facial attacks on any state statute involving First Amendment expression may be brought in federal court even though the overbreadth is not substantial, and that abstention is the exception and is not preferred.

It is now common to see federal courts accept jurisdiction to review state statutes, especially newly enacted ones, before they may be enforced in state courts. The federal courts are not limiting themselves to entertaining declaratory judgment claims, but are

regularly issuing injunctions against the enforcement of new or existing statutes pending the federal litigation. This situation causes delay of several years before such state laws are even available for interpretation in the state courts. See for example Goldstein v. Allain, 568 F.Supp. 1377 (N.D. Miss. 1983), Community Television of Utah v. Roy City, 555 F.Supp. 1164 (D. Utah 1982), Red Bluff Drive-In v. Vance, 648 F.2d 1029 (5th Cir. 1981), Penthouse v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980), Sovereign News Co. v. Falke, 448 F.Supp. 306 (N.D. Ohio E.D. 1977), rev'd., 674 F.2d 484 (6th Cir. 1982).

This Court has contributed to the perception that abstention is not required, in such cases as: Spokane Arcades v. Brockett, 631 F.2d 135 (9th Cir. 1980), affirmed summarily at 454 U.S. 1022 (1981) and Universal Amusement

v. Vance, 587 F.2d 159 (5th Cir. 1978), affirmed on the merits at 455 U.S. 308 (1980). Proper deference can only be shown to the state court systems if new criteria are announced to guide federal courts in (1) determing whether jurisdiction lies, (2) whether the court should exercise such jurisdiction over the declaratory judgment claims, and (3) over the injunction claims and attorneys fees request.

Proposition of Law Number III:

> Even Where Declaratory Relief Is Appropriate, Federal Courts Must Still Consider Injunctive Claims Separately And An Injunction Should Issue Only Where There Is Evidence That The Federal Declaratory Order Will Be Ignored In Bad Faith.

Although the federal courts, in determining whether to entertain the lawsuit challenging a state statute, should deal with the threshold questions of jurisdiction as invoked by the

presence of a totally invalid statute as well as the lack of an adequate remedy in state court, the federal courts should also refuse to entertain injunction claims under 42 U.S.C., Section 1983, until after the declaratory relief has been considered and determined. As a general rule, the federal courts should at most issue a declaratory judgment where the circumstances require, and only issue an injunction if there has been a deprivation of civil rights shown by past bad faith conduct or a need to issue an injunctive order to protect the integrity of the federal declaratory order. If the federal court is not shown that the declaratory judgment will be ignored in bad faith by state officials, no injunction should be considered. Furthermore, an award of attorney fees should only be assessed against state officials where the challenge to the

statute is shown to be required and justifies an injunction under the civil rights act for an actual deprivation of the federal plaintiff's civil rights.

In Fenner v. Boykin, 271 U.S. 240, at 243-44 (1926), the Court held that, even in the absence of a pending state prosecution, a federal complaint must be dismissed and injunctive relief denied against possible or even threatened future prosecutions unless there are "extraordinary circumstances where the danger of irreparable loss is both great and immediate". In Huffman v. Pursue, 420 U.S., at 602-02, the Court explained that this rule of Fenner was expanded in Younger v. Harris, 401 U.S., at 46, and pointed out that extraordinary circumstances would be found where facts are pleaded and proved to show the type of bad faith and harassment by the state which was present in Dombrowski v.

Pfister, 380 U.S. 479 (1965). Huffman, at 602, also noted that federal intervention might also be justified if the statute meets the Watson v. Buck test of being "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it". However, the Court concluded that "we unequivocally held that facial invalidity of a statute is not itself an exceptional circumstance justifying federal interference with state criminal proceedings". These rules should apply whether prosecutions are pending, as in Younger, or merely threatened, as in Fenner.

Fenner, supra at 244, stated that an "intolerable condition would arise if, whenever about to be charged with violating a state law, one were permitted

freely to contest its validity by an original proceeding in some Federal court". Parratt v. Taylor, 451 U.S. 527, 542-44 (1981), held that in order to state a claim under Section 1983, a plaintiff must show that available state procedures are not even adequate to compensate a suffered deprivation. See also: Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981). In Vicory v. Walton, 721 F.2d 1062, at 1065-66 (6th Cir. 1983), cert. denied, ___ U.S. ___, 53 L.W. 3237, No. 83-2111 (Oct. 1, 1984), the Court stated that:

> Section 1983 was not meant to supply an exclusive federal remedy for every alleged wrong committed by state officials. Rather, the statute is a remedy for only those wrongs which offend the Constitution's prohibition against property deprivations without procedural due process. Thus we hold that in section 1983 damage suits claiming the deprivation of property interest without

> procedural due process of law, the plaintiff must plead and prove that state remedies for redressing the wrong are inadequate. In a procedural due process case under section 1983, the plaintiff must attack the state's corrective procedure as well as the substantive wrong. In the instant case the plaintiff has neither alleged nor shown any significant deficiency in the state's remedies.

In Allen v. McCurry, 449 U.S. 90, at 100-01 (1980), this Court set out three circumstances for federal remedies under Section 1983; (1) state law is facially and totally unconstitutional, (2) state procedural law is inadequate to allow full litigation of a constitutional claim, and (3) where the procedural law is adequate in theory but inadequate in practice. "In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights."

The policy expressed in Steffel also recognized that the intrusion of injunctions should be imposed only to prevent manifest injustice and in necessary aid of the federal court's jurisdiction. A federal court should not entertain a prayer for injunction unless bad faith is evident, especially where declaratory relief would suffice to protect the rights of the plaintiff. Only where the court is shown that the State would disregard the declaratory judgment or retaliate against the plaintiff should an injunction issue. As stated in McCarthy v. Briscoe, 553 F.2d 1005, at 1007 (5th Cir. 1977):

> This Court presumes that Texas will not defy the holding of unconstitutionality in the absence of an injunction.

Proposition of Law Number IV:

> The Concept Of Prurient Appeal Is Not Limited To Appeal To A "Shameful And Morbid" Sexual Interest And Properly Includes The Commercial Appeal To Erotic, Lustful, And Otherwise Attractive, As Well As Repulsive, Sexual Interests.

The new Washington statute defined prurient as "that which incites lasciviousness or lust". This is a wholly proper definition of the concept of prurience and is consistent with this Court's use of the term and the great weight of authority. The Ninth Circuit was in error in concluding, in J-R Distributors, 725 F.2d, at 491, that the case law developed since 1957 mandates that only "shameful and morbid" can be used to describe a prurient interest. The Court of Appeals states, at 491:

> We agree with these decisions and reaffirm that, under the first prong of the Miller test, a "prurient interest" is "a shameful or morbid interest in nudity, sex

> or excretion." By including "lust" in its definition of "prurient," the Washington state legislature has clearly exceeded the established--though sometimes blurred--boundries drawn by the Supreme Court to distinguish protected first amendment expression from that which is obscene.

The Court based this conclusion on a restrictive reading of footnote 20 of Roth v. United States, 354 U.S. 476, at 487 (1957) and of Red Bluff Drive-In v. Vance, 648 F.2d 1020, 1026 (5th Cir. 1981); U.S. v. "Language of Love", 432 F.2d 705, 711 (2d Cir. 1970), cert. denied, 403 U.S. 925 (1971); and Goldstein v. Allain, 568 F.Supp. 1377 (N.D. Miss. 1983). The Court of Appeals also found that this Court, in referring to the Model Penal Code definition of "obscenity" in footnote 2 of Miller, supra at 18, "has replaced the definitions offered in Roth" and was imposing "shameful or morbid" as the only

adjectival descriptions of the term "prurient". This is an erroneous and unwarranted conclusion and is directly contrary to the language of this Court's opinions and the historical development of the concept of "prurience". This Court has often rejected limiting prurience to only "shameful and morbid" interests. Even the Model Penal Code did not consider the term so limited. The term as defined in the Washington (and Arizona and Mississippi) statute cannot be said to be unconstitutionally and substantially overbroad and this Court should not foreclose the State's right to develop this concept of prurience within historical parameters. Indeed, footnote 2 of Miller refers to Roth, at 487, as providing the source of the "specific judicial meaning" of obscene material. The Model Penal Code itself recognized the erotic quality of obscenity, and its

Commentaries explain this in greater depth. Indeed, Miller's footnote 2 says the word pornography "now means . . . a portrayal of erotic behavior designed to cause sexual excitement".

Confusing the offensiveness of pornography with prurience ignores the reason that Miller provided a three part test. Prurience was retained as a way to require that sexual conduct be exploited for its commercial value rather than its artistic or scientific uses. This is recognized in the cases dealing with "pandering". It is the second prong of Miller which safeguards mere nudity and non-offensive material from prosecution, not the first. Even though attractive and erotic or lustful material may be "prurient", the work must also present hard-core sexual conduct in a "patently offensive way". This prong prevents the type of suppression feared by the Court

of Appeals on pages 490-92 of the opinion below.

It was in footnote 20 of Roth v. U.S., supra at 487, that the Court first defined in its own words that appeal to prurient interest meant "having a tendency to excite lustful thoughts". [Emphasis added.] This remains to this day the only direct and isolated definition ever given by this Court. All other references to prurient interest and what constitutes an illegal appeal to prurience are contextual examples. Together these references by this Court to the concept of prurience serve to guide the courts and juries in finding obscenity, and have never mandated a singular route to such determination.

In Mishkin v. New York, 383 U.S. 502, at 508 (1966), Hamling v. United States, 418 U.S. 87, at 127-29 (1974), and Pinkus v. United States, 436 U.S.

293, at 301-03 (1978), this Court affirmed that when materials are intended to stimulate a specific deviant group or a specific deviant sexual interest, then the jury can decide whether the average person would find the appeal of the matter to be to the "general" prurient interest or the deviant prurient interest.

In Mutual Film Corp. v. Industrial Com., 236 U.S. 230, at 242 (1915), cited with approval in footnote 20 of Roth v. U.S., supra, the general observation was made about the attraction of pornography to normal persons:

> They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a prurient interest may be excited and appealed to.

This Court later characterized this trait in Ginzburg v. United States, 383 U.S. 463, at 471 (1966), as "the

widespread weakness for titillation by pornography".

This Court has used various descriptive words to illustrate what prurience may mean. Material can be prurient when it either attracts or repulses, as stated in Mishkin at 508. Attractively erotic material, even to the average person, has been held obscene. Ginzburg, supra; Hamling, supra. See also Penthouse v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980), and Miller v. United States, 431 F.2d 655, 658 (9th Cir. 1970). Bizarre material, repulsive to the average person, has also been found obscene. Mishkin, supra; Ward v. Illinois, supra.

This Court used the words "lewd" and "lascivious" in Roth, footnote 20, and also referred to the Model Penal Code's use of "shameful or morbid". In another case which sought to separate protected

sexual expression for political purposes from the pornographic prurience of obscenity, Cohen v. California, 403 U.S. 15, at 20 (1971), said that:

> [T]o prohibit obscene expression, such expression must be, in some significant way, erotic.

Prurient appeal is properly a synthesis of these adjectives to describe an interest in sex for its own sake, for commercial gain. See: Schauer, The Law of Obscenity, at 96-102 (D.C.: BNA, 1976); Model Penal Code, Commentaries, Part II, Article 251.4, at 488-94 (A.L.I., 1980).

It is important to note that the Bar Association's Model Penal Code also recognized the "erotic" nature of prurient appeal and did not preclude this recognition in using the adjectives "shameful and morbid" in its Draft. As

stated in the Model Penal Code Commentaries, supra at 491-92:

> Prurient interest involves an exacerbated, morbid, or perverted interest growing out of the conflict between the universal sexual drive of the individual and the equally universal social controls of sexual activity. The Model Code provision rests on the proposition that society may legitimately seek to deter the deliberate stimulation and commercial exploitation of emotional tensions arising from this conflict.
>
> * * *
>
> The Model Code definition follows the great weight of prior authority in restricting obscenity to the erotic. This limitation is imposed by requiring that the prurient interest appealed to concern sex, nudity, or excretion. [Emphasis added.]

One of the best examples of this mixture of "tendency to arouse lustful thoughts" and the appeal to a "shameful or morbid interest" is set out in State v. Bartanen, 591 P.2d 546, at 550-52 (Supreme Court, Arizona, In Banc, 1979).

The trial court charged the jury: "The term appeal to the prurient interest means to excite lustful thoughts, a shameful or morbid interest in sex or nudity, arouse sexual desires or sexually impure thoughts, inclined to or disposed to lewdness, having lustful ideas or desires." Id. at 550. The Arizona Supreme Court upheld and approved this definition as a synthesis of the "appeal" and the "tendency" functions of prurience. As stated by the Court, at 552:

> The trial court herein used both the so-called "appeal" approach to obscenity, that is, does the material appeal to a morbid, shameful, disgusting, unhealthy, unwholesome, degrading interest in sex, as well as a "tendency" of the material to excite "lustful ideas or desires."
>
> We believe the trial court correctly instructed the jury.

Such a concept has long been the law of Ohio, and often employed by the trial

courts. See: Youngstown v. DeLoreto, 19 Ohio.App.2d 267 (Ct.App.Ohio 1969).

However, as pointed out in Mishkin, supra at 508; Hamling, supra at 128-30; and Pinkus, supra at 301-03, it is proper, when the evidence calls for it, to allow the jury to measure the material "by its appeal to the prurient interest not only of the average person but also of a clearly defined deviant group". Hamling, supra at 128.

In Hamling, supra at 128, this Court noted that: "Petitioners appear to argue that if some of the material appeals to the prurient interest of sexual deviants while other parts appeal to the prurient interest of the average person, a general finding that the material appeals to a prurient interest in sex is somehow precluded." The Court relied on Mishkin in rejecting this contention, and stated in Hamling, supra at 129:

> The District Court's instruction was consistent with this statement in Mishkin. The jury was instructed that it must find that the materials as a whole appealed generally to a prurient interest in sex. In making that determination, the jury was properly instructed that it should measure the prurient appeal of the materials as to all groups.

It is important to remember that this Court did not define obscenity so that the jury was to decide only whether the matter appealed to the prurient interest of the average person applying contemporary community standards, but rather that the jury determine whether the average person, if the average person applied those standards, would find the appeal to be to a prurient interest. The question is whether the appeal of the material would be to a generally erotic or shameful interest in sex, whether that interest was that of an average person or that of a deviant class. See: State v.

Tidyman, 568 P.2d 666, 674 (Ct. App. Or. 1977).

This subtle distinction is not a harmless one and is important. If a court were to charge a jury that they must find the matter obscene, if at all, only when it appeals or excites a shameful or morbid interest in an average person or in the jury, then confusion would result and the whole purpose of obscenity law would be thwarted.

The legal error in this reasoning is clearly set out in Mishkin v. New York, 383 U.S. 502, at 508 (1966), where this Court explained:

> Indeed, appellant's sole contention regarding the nature of the material is that some of the books involved in this prosecution, those depicting various deviant sexual practices, such as flagellation, fetishism, and lesbianism, do not satisfy the prurient-appeal requirement because they do not appeal to a prurient interest of the "average person" in sex, that

> "instead of stimulating the erotic, they disgust and sicken." We reject this argument as being founded on an unrealistic interpretation of the prurient-appeal requirement.

Any discussion of the meaning of prurient appeal must also consider the correlative concept of pandering. Pandering is a term of art in obscenity law which relates to exploiting the prurient nature of material for commercial purposes rather than emphasizing some legitimate interest in sex, such as scientific, medical, or education interests in sexual subject matter. This has application in the "Miller Test" in determining the "serious value" of the material, but requires the finding of a commercial appeal to the prurient qualities of the material. This Court's development of the pandering concept illustrates what is meant by the all important ingredient of prurience,

since that is the heart of pandering and the true concept of obscenity regulation. Motivation is very much a part of obscenity law, as evidenced by this Court's holding in Ginzburg v. United States, supra, that sexual matter which may not be obscene per se in other contexts can be the subject of a conviction if it was pandered for prurient interest exploitation. The development of the pandering law also bears on how "prurient" is to be defined and used, and illustrates how an appeal to lust and erotic curiosity form an integral part of prurience, rather than solely a limitation to the "shameful and morbid".

The development of this concept continued in Splawn v. California, 431 U.S. 595, at 598 (1977):

> There is no doubt that as a matter of First Amendment obscenity law, evidence of

> pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether the material is obscene.

This is a short statement of the principles applied in Ginzburg v. U.S., supra, 383 U.S., at 466, where the Court stated that it was viewing the material "against a background of commercial exploitation of erotica solely for the sake of their prurient appeal". [Emphasis added.] At 467-68, Ginzburg outlined the advertising and promotion evidence and characterized the business involved as:

> [T]he sordid business of pandering - "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers".

Pinkus v. U.S., supra, 436 U.S., at 303-04, made clear that no extensive evidence need be adduced before an instruction is warranted to assist the

jury in determining whether the material was distributed for its prurient appeal or for its serious value. "In essence, the Court has considered motivation relevant to the ultimate evaluation if the prosecution offers evidence of motivation." Id., at 303.

In a practical application of this principle, the Supreme Court of Indiana upheld a pandering instruction, taken from Splawn v. California, 431 U.S., at 597-98, upon the evidence that the materials were sold from an "adult" bookstore, clearly marked as such, and dealing openly with sexual devices, books, and films of a hard-core pornographic nature. Sedelbauer v. State, 428 N.E.2d 206, at 207-08 (Supreme Court of Indiana, 1981), cert. denied, 455 U.S. 1035 (March 22, 1982).

The jury charge approved by the Court in Splawn, supra at 597-98,

indicates the range of adjectives properly used to describe prurience. The trial court charged the jury:

> If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter is utterly without redeeming social importance. [Emphasis added.]

This Court in Splawn, at 598, also refers to and quotes from Ginzburg, supra at 470, where the Court said:

> The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. [Emphasis added.]

This Court recognized the greater latitude state courts have for forming instructions and held that Ginzburg and Hamling "clearly show" that the charge violated no First or Fourteenth Amendment rights. Splawn, supra at 599.

Many other courts have also discussed the prurience concept and its definitional parameters, and have not limited them in a constitutional sense to the "shameful and morbid" restrictions adopted by J-R Distributors, supra, and Goldstein v. Allain, supra. In fact one New York court noted that "shameful and morbid" was deleted from the New York statute in 1974 and this was in keeping with a shift away from a restrictive reading of the Model Penal Code by the Supreme Court. The court reasoned that the Roth reference was to the "case law developed to date", up to 1957, and that the Court's own definition of "tendency to excite lustful thoughts" was an indication of a new direction. People v. Ciampa, 394 N.Y.S.2d 727, 732 (Sup. Ct., App. Div., 1977).

Following is a list of cases dealing with the various adjectives describing

"prurient". The only common thread is the realization that prurience is not a precise nor limited concept and varies widely. These cases serve to prove that the Washington, Arizona, Mississippi, and other broader definitions of "prurient" accept the parameters of the terms as used by this Court.

Federal cases: Flying Eagle Publications v. United States, 273 F.2d 799, 803 (1st Cir. 1960); U.S. v. Darnell, 316 F.2d 813, 816 (2d Cir. 1963); U.S. v. Keller, 259 F.2d 54, 58 (3rd Cir. 1958); U.S. v. Central Magazine Sales, 381 F.2d 821, 823 (4th Cir. 1976); Interstate Circuit v. City of Dallas, 366 F.2d 590, 596 (5th Cir. 1966); U.S. v. Battista, 646 F.2d 237, 245 (6th Cir. 1981); Luros v. U.S., 389 F.2d 200, 203 (8th Cir. 1968); Eastman Kodak v. Hendricks, 262 F.2d 392, 397-98 (9th Cir. 1958); Childs v. State of Oregon, 431

F.2d 272, 275, 276 (9th Cir. 1970); U.S. v. Pinkus, 551 F.2d 1155, 1159-60 (9th Cir. 1977); U.S. v. One Reel of Film, 360 F.Supp. 1067, 1071-72 (D. Mass. 1973); and U.S. v. 31 Photographs, 156 F.Supp 350 (S.D.N.Y. 1957). See also: Besig v. U.S., 208 F.2d 142, at 145-46 (9th Cir. 1953) (not contradictory to say obscenity "repels" and "seduces").

State cases: State v. LeWitt, 222 A.2d 579, 582 (Ct. App. Conn. 1966); State v. Anonymous, 377 A.2d 1342, 1343 (Super. Ct. Conn. 1977); Spry v. State, 274 S.E.2d 2 (Ct. App. Ga. 1981) (statute uses "shameful and morbid", but permissible for courts to add instructions on "tendency to excite lustful thoughts"); State v. Great American Theatre, 608 P.2d 951, 952-59 (Sup. Ct. Kansas, 1980) (lengthy discussion of history and breadth of term); Little Store v. State, 453 A.2d

1215, 1216-17 (Ct. App. Md. 1983); Commonwealth v. Mascolo, 375 N.E.2d 17, 26 (App. Ct. Mass, 1978); People v. Ciampa, 394 N.Y.S.2d 727, 732 (Sup. Ct., App. Dept., 1977) ("tendency to excite lasciviousness", and lasciviousness is defined as "tending to arouse sexual desire"); State v. Schwing, 328 N.E.2d 379, 382 (Sup. Ct. Ohio 1975) (prurient must be erotic); State v. Tidyman, 568 P.2d 666, 674 (Ct. App. Or. 1977); State v. Grabill, 579 P.2d 316, 320 (Ct. App. Or. 1978); Commonwealth v. Rich, 437 A.2d 516, 519-20 (Com. Ct. Pa. 1981) (no need to define prurient); State v. Barrett, 292 S.E.2d 590, 591-92 (Sup. Ct. S.C. 1982) (Prurient Interest "means a shameful and morbid interest in nudity, sex, or excretion and is reflective of an arousal of lewd and lascivious desires and thoughts."); State v. Little Art Corp., 215 N.W.2d 853, 856 (Sup. Ct. Neb.

1974) (prurient includes "shameful and morbid", "excite lustful thoughts", "tending to excite lasciviousness", and "presence or arousal of sexual desire"); and Andrews v. State, 652 S.W.2d 370, 375-77 (Texas Ct. Cr. App. 1983).

Proposition of Law number V:

The Penalty Provisions Of The Washington Statute Are Not Unreasonable On Their Face And Can Be Applied Constitutionally.

The Ninth Circuit opinion below, at 493-96, makes a wholly hypothetical assumption that the civil fines for maintaining a moral nuisance can be or would be used unconstitutionally. The statute is clear in directing the equity court to fashion a remedy only against a defendant who knowingly violated the law, and to consider wilful conduct and "profits made by the defendant attributable to the moral nuisance".

[Emphasis added.] First, the statute does not specifically state that legitimate profits are to be attached. It clearly states that the court shall consider profits attributed to the nuisance. If there is any vagueness present here, which amicus submits there is not in light of the broad powers given equity and civil courts (such as in all other civil tort and contempt cases), then the state courts will deal with them in specific fact situations. These state rulings will then be examined by appellate and federal courts.

The function of any penalty is both punishment and deterrence. As was recognized by Judge Hardy of the District Court of Arizona in the recent case of Polykoff v. Collins (copy in Appendix), substantial deterrence is entirely proper. Judge Hardy upheld the criminal fines of Arizona, which reach up to One

Million Dollars for corporations, because there was no evidence that state judges have, or would ever, exact unreasonable fines in circumstances where it would be unfair in relation to the offense. The Arizona Supreme Court has provided the state judiciary with guidelines for fines by adopting portions of the ABA's Standards for Criminal Justice Relating to Sentencing Alternatives and Procedures, Sections 2.7(b) and (c). In re Collins, 108 Ariz. Rpts. 310, at 312-13, 497 P.2d 523 (1972). These standards provide that a court "should consider" financial resources as well as deterrence.

These criteria allow a judge to levy a fine that will be sufficient to deter future criminal activity, but will not unfairly destroy a defendant financially. There is no reason to assume that Washington's judiciary cannot be trusted

to follow these or similarly fair guidelines.

The state courts can also conduct fact finding sentencing hearings to determine the proper penalty, as is done in federal courts under 18 U.S.C. 3577. See: U.S. v. Fatico, 441 F.Supp. 1285 (E.D.N.Y. 1977) ("Fatico I"), rev'd, 579 F.2d 707 (2d Cir. 1978), on remand, 458 F.Supp. 388 (E.D. N.Y. 1978 ("Fatico II"), aff'd 603 F.2d 1053 (2d Cir. 1979). See also: U.S. v. Ammirato, 670 F.2d 552 (5th Cir. 1982).

Finally, since this Court was deprived of its stated desire to review the one-year closure remedy for an obscene nuisance which was upheld by the Idaho Supreme Court, it should not now allow the Ninth Circuit opinion to stand as authority that equitable remedies are unlawful because they are not pre-set by the legislature. See State, ex rel.

Kidwell v. U.S. Marketing, 631 P.2d 622, upon which jurisdiction was noted but the appeal was dismissed by U.S. Marketing over the State's objection, 454 U.S. 1140, 455 U.S. 1009. If total closure for one year can be a lawful punishment for past misconduct, and forfeitures of unlimited properties and funds can be assessed in tax, contempt, and racketeering cases, then the Washington civil penalty scheme is also entitled to case-by-case application and review in its own courts. It should not be presumed invalid, for this also assumes "bad faith" on the part of the Washington judiciary. This is a grave blow to federalism which this Court should not tolerate.

CONCLUSION

The federal courts should never have entertained the Complaint in this case. The new statute could not be found so totally invalid that it could not be applied constitutionally, and its interpretation and application properly belonged in state court. This Court must fashion new and clear guidelines to prevent federal courts from continuing to act as "super-legislatures".

The state legislatures and court systems are entitled to an honest deference. Unless a challenged law meets the test of Watson v. Buck, supra, the federal courts should be said to lack subject matter jurisdiction to review them, even when no pending case is begun in state court. Indeed, Washington's courts never got a chance to even review the statutes. This was grossly unfair, and unnecessary. The whole body of

obscenity and First Amendment cases provide adequate guidelines for state courts to follow and this Court should let them do so.

Respectfully submitted,

Tom Collins
Maricopa County Attorney
Amicus Curiae

Sandor O. Shuch
Deputy County Attorney

By: Bruce A. Taylor
Attorney for Amicus Curiae

APPENDIX

Polykoff, et al. v. Collins,

___ F.Supp. ___,

No. CIV 84-1101

(D.Ariz. 1984)

(Filed July 11, 1984)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Louis Polykoff, IAS, Inc., Charles Stuart, Charles Clapp, Jess Emery, David Fuehring, Modernworld, Inc., Tony Dumbsky, Bill Henderson, Elise White, and Michael Kaplan, Plaintiffs, v. Thomas E. Collins, in his official capacity as County Attorney for Maricopa County, Arizona, Defendant.	)	No. CIV 84-1101 PHX CLH MEMORANDUM OPINION AND ORDER

Invoking the Civil Rights Act, 42 U.S.C. §1983, plaintiffs Louis Polykoff, IAS, Inc., Charles Stuart, Charles Clapp, Jess Emery, David Fuehring, Modernworld, Inc., Tony Dumbsky, Bill Henderson, Elise White, and Michael Kaplan seek a declaratory judgment and injunction restraining defendant Thomas E. Collins, in his official capacity as the Maricopa County Attorney, from prosecuting them for violations of section 13-3502 of the

Arizona Revised Statutes on the basis that this statute abridge rights secured by the First and Fourteenth Amendments of the United States Constitution. At the close of the hearing for the plaintiffs' application for preliminary injunction, the parties stipulated that the Court's findings of fact may be deemed conclusive and that a trial on the merits would not be necessary. The trial of this action on the merits, therefore, will be deemed consolidated with the hearings for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65(a)(2). The following memorandum opinion will serve as the Court's findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52.

I. FACTS

The plaintiffs are corporations and individuals who are either owners or employees of stores that sell materials,

such as magazines or films, depicting adults engaged in various sexual activities. These stores are located in Maricopa County. The defendant, as the County Attorney, is charged with the duty of prosecuting persons who violate the state laws within Maricopa County.

Under the A.R.S. §13-3502, a person who knowingly sells or offers to sell any "obscene item" is guilty of a class 6 felony. An item is obscene as the term is used in §13-3502 when:

> (a) The average person, applying contemporary state standards would find that the time, taken as a whole, appeals to the prurient interest; and
> (b) The item depicts or describes, in a patently offensive way, sexual activity as that term is described herein; and
> (c) The item taken as a whole, lacks serious, literary, artistic, political or scientific value.

A.R.S. §13-3501.2. Under Arizona's sentencing statutes, an enterprise and an individual guilty of a class 6 felony may

be punished by imposition of fines of up to $1,000,000 and $150,000 respectively. A.R.S. §13-804, 13-801.

The defendant has successfully prosecuted a number of adult book store owners for violations of §13-1302. Fines of up to $7,500, all pursuant to plea agreements, have been imposed by the Maricopa County Superior Court. The defendant would prosecute the plaintiffs if there were probable cause to believe that they violated §13-3502.

Plaintiffs' complaint seeks, in addition to injunctive relief, a judgment declaring §13-3502 unconstitutional on two grounds: first, the statute's use of the term "prurient interest" to define obscenity, as it has been interpreted by the Arizona Supreme Court in State v. Bartanen, 121 Ariz. 454, 591 P.2d 546, cert. denied, 444 U.S. 884 (1979), renders §13-3502 overbroad and, second,

the classification of violations of §13-3502 as a class 6 felony, punishable by fines of up to $1,000,000, is a prior restraint upon the plaintiffs' freedom of speech.

II. JURISDICTION AND ABSTENTION

The jurisdiction of this Court is based upon 28 U.S.C. §1343(a)(4), which implements the Civil Rights Act. Although the plaintiffs have not been prosecuted under §13-3554, the fact that other owners of adult book stores have been prosecuted is a sufficient threat of prosecution to create the jurisdictional predicate of an "actual controversy." See Steffel v. Thompson, 415 U.S. 452, 459 (1974); cf. Ellis v. Dyson, 421 U.S. 426 (1975). Accordingly, the Court finds that it has jurisdiction over this case.

The defendant first contends that the Court should abstain from exercise of its jurisdiction in favor of pending

state litigation concerning the same controversy. It is, however, a "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." Colorado River Water Conservation District v. United States, 424 U.S. 800, 817 (1976). Therefore, "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." Id. at 813. There are three general categories of abstention, none of which are applicable to this case:

First, abstention is appropriate "in cases presenting a federal constitutional issue which might be mooted or presented by a state court determination of pertinent state law." County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189 (1959). The defendant has not suggested a construction §13-3502 that would obviate the plaintiffs'

constitutional challenge. Section 13-3502, moreover, has been authoritatively construed in its relevant parts by the Arizona Supreme Court in State v. Bartanen, 121 Ariz. 454.

Second, abstention is also appropriate when the case presents "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." Colorado River Conserv. Dist., 424 U.S. at 814. In this case, the Court is not called upon to construe state law in view of state policy. Rather, state law will be considered in the context of a federal constitutional challenge.

Finally, abstention is appropriate when "federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, . . . state nuisance proceedings antecedent to a

criminal prosecution, which are directed at obtaining closure of places exhibiting obscene films, . . . or collection of state taxes." Id. at 816 (citations omitted). At this time there is no pending state criminal prosecution or state nuisance proceeding against the plaintiffs.

In view of the above considerations, defendant's bid for abstention appears to be based merely upon a preference for having the constitutionality of this statute determined in state court. This is not a legitimate reason for a federal court to decline to exercise jurisdiction and, therefore, the Court will deny the plaintiffs' motion to dismiss. See, e.g., J-R Distributors, Inc. v. Eikenberry, 725 F.2d 482 (9th Cir. 1984); Kit-Dal Cinema v. Village of Downers Grove, Ill., 534 F.Supp. 81 (N.D.Ill. 1981).

III. THE OVERBREADTH ISSUE

The plaintiffs first contend that §13-3502 is facially overbroad insofar as it outlaws expression protected by the First Amendment and, therefore, must be declared unconstitutional. Application of the First Amendment overbreath doctrine to bar all enforcement of a statute is "strong medicine" and, accordingly, has been applied "with hesitation, and then only as a last resort." New York v. Ferber, 458 U.S. 747, 769 (1982) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)). Three requirements must be met before §13-3502 may be declared invalid on its face. First, the statute must bring within its sweep expression protected by the First Amendment. J-R Distributors, Inc. v. Eikenberry, 725 F.2d 482, 486 (9th Cir. 1984); Wurtz v. Disley, 719 F.2d 1438, 1440 (9th Cir. 1983). Second,

the statute must not be readily subject to a narrowing construction by the state courts which might cure the constitutional deficiency. See Ferber, 458 U.S. at 769 n. 24; Erznoznik v. City Jacksonville, 422 U.S. 205, 216 (1975). Third, the deterrent effect on legitimate expression must be both real and substantial. Erznoznik, 422 U.S. at 216; see also Ferber, 458 U.S. at 769-70. A discussion of each of these requirements of the overbreadth doctrine will not be necessary, however, because the Court finds that §13-3502 does not prohibit legitimate expression.

Section 13-3502 defines obscenity by adopting the tripartite test established in Miller v. California, 413 U.S. 15, 24, rehearing denied, 414 U.S. 881 (1973). One definitional element of obscenity, thus, is that the item "appeal to the prurient interest." A.R.S. §13-501.2(a).

The plaintiffs' first point of contention with respect to §13-3502 is that the term "prurient interest " as defined by the Arizona Supreme Court in State v. Bartanen, 121 Ariz. 454, is unduly broad.

In Bartanen, the Arizona Supreme Court approved the following jury instruction concerning the meaning of "prurient interest:"

> The term appeal to the prurient interest means to excite lustful thoughts, a shameful or morbid interest in sex or nudity, arouse sexual desires or sexually impure thoughts, inclined to or disposed to lewdness, having lustful ideas or desires.
>
> . . . .
>
> The term prurient interest in sex is not the same as a candid, wholesome, or healthy interest in sex. Material does not appeal to the prurient interest just because it deals with sex or shows nude bodies. Prurient interest is an unhealthy, unwholesome, morbid, degrading or shameful interest in sex, a leering or longing interest. An appeal to the prurient interest is an appeal to sexual desire, not an appeal to sexual interest. An interest in sex is normal, but if the material appeals to an abnormal interest in

> sex, it can appeal to the prurient interest. . . .

121 Ariz. at 458. Taking inventory of the various definitions of "prurient interest" developed by courts and legal authorities, the Arizona Supreme Court concluded that there were in use essentially two definitional standards for this term: the "appeal" approach, an "appeal to a morbid, shameful, disgusting, unhealth, unwholesome, degrading interest in sex," and the "tendency" approach, a tendency "to excite lustful ideas or desires." See 121 Ariz. at 459-60. Without expressing a preference for one over the other, the court determined that the instruction was valid because it combined the two standards:

> The position taken by the trial court that an "appeal to the prurient interest" is to be judged by both the objective nature of the material and the human instincts which it tends to arouse is correct

> under the facts of this case. We believe therefore that the instructions, when read as a whole, provided the jury with an adequate and sufficient direction upon which they could reach a proper verdict based on the evidence before them.

121 Ariz. at 460. As a result of the Bartanen decision, the instruction approved therein has become a standard jury instruction for obscenity prosecutions in the Arizona courts.

The plaintiffs contend that the Arizona Supreme Court's interpretation of "prurient interest" must be viewed as unconstitutional in light of the recent Ninth Circuit opinion, J-R Distributors, Inc. v. Eikenberry, 725 F.2d 482. In J-R Distributors, the Ninth Circuit was called upon to determine the validity of the State of Washington's anti-obscenity statute, which defined "prurient interest" as "that which incites lasciviousness or lust." 725 F.2d at 490. The court concluded that "prurient

interest" is "a shameful or morbid interest in nudity, sex or excretion." Id. at 491. The court also observed that the contemporary meaning of "lust" was little more than sexual desire, "a healthy, wholesome, human reaction common to millions of well-adjusted persons in our society." Id. at 490. As a result, lust could not properly be regarded as a connotation of the "prurient interest" and, because the Washington statute defined "prurient interest" in the alternative as lust, the statute was overbroad and unconstitutional. Id. at 491.

This Court, of course, must follow all decisions of the Ninth Circuit Court of Appeals. This Court concludes, however, that the Arizona Supreme Court's discussion of the term "prurient interest" is not inconsistent with that of the Ninth Circuit in J-R Distributors.

The basis for the Ninth Circuit's ruling was that, under the Washington statute, materials found to incite lust might be deemed to "appeal to prurient interest" regardless of whether the materials also appealed to "a shameful or morbid interest in sex, nudity or excretion.' Under this Court's reading of Bartanen and the jury instruction approved therein, "prurient interest" under §13-3502 is defined as appealing to a shameful, disgusting, unhealthy, unwholesome, degrading, interest in sex as well as tending to excite lustful ideas or desires. Nowhere in the Bartanen opinion are these standards stated as alternatives, such that one standard may serve as a basis for a find§ing of "prurient interest" independently of the other. The Bartanen Court, perhaps, assumed that "lust" was synonymous with "a shameful or morbid

interest" in sex. Regardless, the Bartanen Court left no room for a jury to base a finding of prurient interest upon a finding of a tendency in the material to cause lust under the contemporary meaning of that term. The jury instruction approved by the court as a proper definition of "prurient interest" repeatedly defines "prurient interest" as something abnormal, "an unhealthy, unwholesome, morbid, degrading, or shameful interest in sex." This is the definition approved by the Ninth Circuit in J-R Distributors and, therefore, §13-3502 is not unconstitutionally overbroad.

IV. THE PRIOR RESTRAINT ISSUE

Under §13-3502, the sale of obscene items is a class 6 felony. In Arizona, a class 6 felony committed by an individual is punishable by imprisonment of a fine of up to $150,000. A.R.S. §13-801 A.

The same felony committed by an enterprise may be punished by a fine of up to $1,000,000. A.R.S. § 13-804.1. The plaintiffs second contention is that the criminal fine provisions, as applied to violations of §13-3502, operate as a prior restraint upon their freedom of speech and, therefore, §13-3502 must be declared invalid.

The plaintiffs again rely on J-R Distributors, where the Ninth Circuit ruled that the civil penalty provision contained within the Washington anti-obscenity statute was unconstitutional. The statute provided that once it has been determined "that a defendant has with knowledge maintained a moral nuisance, the court shall impose a civil penalty and judgment of an amount as the court may determine to be appropriate. In imposing the civil penalty, the court shall consider the

willfulness of the defendant's conduct and the profits made by the defendant attributable to the moral nuisance." J-R Distributors, 725 F.2d at 493. The court observed that "the civil fine, which is premised in part on profits 'attributable to the moral nuisance,' may be based on profits from the sale of protected materials in a place that is a moral nuisance solely because obscene materials were also sold or exhibited there." Id. at 494. The court held "that it is impermissible, in an anti-obscenity statute, to provide that the amount of a fine shall be based, even in part, on the proceeds from constitutionally protected material." Id.

The Ninth Circuit's analysis employed two lines of First Amendment law. First, the civil penalty provision,which was attached only to the anti-obscenity statute, created

differential treatment for First Amendment activity. The provisions, thus, was presumptively unconstitutional. J-R Distributors, 725 F.2d at 495-496; see Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, ___ U.S. ___, 103 S.Ct. 1365, 1375, 75 L.Ed.2d 295 (1983). Second, the civil penalty provision was perilously similar to padlocking statutes insofar as both "have the effect of preventing the dissemination of protected speech simply because obscene speech originated from the same location." Id. at 495. In Near v. Minnesota, 283 U.S. 697 (1931), an early decision establishing the doctrine of prior restraint, the evil of prior restraint was found in an abatement statute that provided that upon violation no further publications could be made--regardless of whether the subsequent publication was non-obscene or

non-libelous--unless approval was received from a local court. In J-R Distributors, the restraint was an economic sanction, not a padlock on a door. It was designed, nevertheless, with the same purpose of abating a moral nuisance. The civil penalty provision, thus, was deemed a form of prior restraint and therefore unconstitutional. Id.

J-R Distributors does not require that §13-3502 be declared unconstitutional. First, unlike the Washington statute, §13-3502 does not establish differential treatment of first amendment activity with respect to the imposition of fines. Enterprises or individuals who violate §13-3502 are penalized under the same guidelines as any other class 6 felon. Thus, this statute does not carry with it a presumption of unconstitutionality.

Second, and most importantly, the criminal fine provisions in question, §§13-801 and 13-804, does not authorize sentencing judges to use criminal penalties as a form of prior restraint. As the Supreme Court noted in Near v. Minnesota, 283 U.S. at 711, one objectionable aspect to abatement statutes such as a padlocking statute is that "[t]he object is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical." A statute authorizing criminal fines for violation of an obscenity law is distinguishable from a statute designed to abate moral nuisances on the basis that the former serves the legitimate purpose of punishing illegal conduct while the latter is clearly directed toward suppression of speech. Arizona's sentencing provisions do not permit courts to use criminal fines for

suppressive purposes. In In Re Collins, 108 Ariz. 310, 311012, 497 P.2d 523 (1972), the Arizona Supreme Court adopted the American Bar Association's Minimum Standards for Criminal Justice Relating to Sentencing Alternatives and Procedures, §2.7(b) and (c):

> (b) Whether to impose a fine in a particular case, its amount up to the authorized maximum, and the method of payment should remain within the discretion of the sentencing court. The court should be explicitly authorized to permit installment payments of imposed fine, on conditions tailored to the means of the particular offender.
>
> (c) In determining whether to impose a fine and its amount, the court should consider:
>
> (i) the financial resources of the defendant and the burden that payment of a fine will impose, with due regard to his other obligations;
>
> (ii) the ability of the defendant to pay a fine on an installment basis or on other conditions to be fixed by the court;
>
> (iii) the extent to which payment of a fine will interfere with the ability of the defendant to make any ordered restitution or

> reparation to the victim of the crime; and
>
> (iv) whether there are particular reasons which make a fine appropriate as a deterrent to the offense involved or appropriate as a corrective measure for the defendant.

These guidelines are designed to insure that criminal fines are used only for deterrent purposes and are not so severe as to pose an unreasonable debt upon the defendant. The criminal fine provisions applicable to violations of §13-3502, therefore, do not constitute a prior restraint of the likeness of the civil penalty provision in J-R Distributors.

V. THE CHILL ISSUE

The plaintiffs make the additional argument that the criminal fine provisions applicable to violations of §13-3502 are unconstitutional because their effect is to "chill" the exercise of First Amendment rights. This contention is essentially that these

provisions not only permit a prior restraint to result from the imposition of severe fines, but also force the plaintiffs to engage in self-censorship for fear of violating §13-3502 and, thereby, becoming subject to the fines of §13-801 and §13-804.

The Court first of all questions the legitimacy of the plaintiffs' complaint of a chill, given the guidelines imposed in In Re Collins. But assuming that an actual chill does exist, it would seem imprudent to require, as a matter of Constitutional law, that the chill be redressed by imposing substantive limitations on the power of a state to punish individuals lawfully convicted of obscenity law violations. The chill complained of in this case is nothing more than deterrence, a state objective the legitimacy of which is implied by the fact that obscenity may be outlawed. The

Supreme Court has compensated for the ambiquities in the definition of obscenity by imposing the requirement of scienter as an element of obscenity offenses. Mishkin v. New York, 383 U.S. 502, 511 (1966). This Court disagrees with the plaintiffs' contention that the sentences or fines imposed for violations of obscenity laws must also be restricted to protect the exercise of First Amendment freedoms.

IT IS ORDERED denying plaintiffs' application for injunctive relief.

IT IS FURTHER ORDERED directing entry of judgment in favor of the defendant.

Dated this 10th day of July, 1984.

/S/ Charles L. Hardy

CHARLES L. HARDY
Judge of the United States
District Court

cc: all counsel of record

CERTIFICATE OF SERVICE

On this 12th day of November, 1984, six (6) copies of this Brief Amicus Curiae were placed in the U.S. Mail, first class postage prepaid, to each of the attorneys required to be served:

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In addition, a copy will be sent to each attorney representing an amicus curiae in this case, as their identities become known.

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MOTION FILED

NOV 13 1984

Nos. 84-28 and 84-143

In The

Supreme Court of the United States

October Term, 1984

No. 84-28

DONALD C. BROCKETT,
Spokane County Prosecuting Attorney
Appellant,

vs.

SPOKANE ARCADES, INC., et al.,
Appellees,

No. 84-143

KENNETH EIKENBERRY,
Attorney General for the State of Washington, et al.,
Appellants,

vs.

J-R DISTRIBUTORS, INC., et al.,
Appellees,

On Appeal From The United States
Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE BY MISSISSIPPI CITIZENS FOR DECENCY THROUGH LAW IN SUPPORT OF DEFENDANTS — APPELLANTS AND BRIEF OF AMICUS CURIAE IN SUPPORT OF DEFENDANTS — APPELLANTS

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QUESTION PRESENTED

WHETHER THE DEFINITION OF "PRURIENT INTEREST" IS CONSTITUTIONALLY OVERBROAD BECAUSE IT IS DEFINED IN THE STATE STATUTE AS THAT WHICH INCITES LASCIVIOUSNESS OR LUST AND IS NOT LIMITED TO A SHAMEFUL AND MORBID INTEREST IN NUDITY, SEX, OR EXCRETION.

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Nos. 84-28 and 84-143

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No. 84-28

DONALD C. BROCKETT,
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J-R DISTRIBUTORS, INC., et al.,
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On Appeal From The United States
Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE BY MISSISSIPPI CITIZENS FOR DECENCY THROUGH LAW IN SUPPORT OF DEFENDANTS — APPELLANTS AND BRIEF OF AMICUS CURIAE IN SUPPORT OF DEFENDANTS — APPELLANTS

Mississippi Citizens for Decency through Law (MCDL) is an association of citizens organized for the purpose of combatting the commercial exploitation of

obscene materials within the State of Mississippi and her sister states throughout the country. As such, MCDL respectfully moves this Honorable United States Supreme Court, pursuant to Court Rule 36, for leave to file a Brief Amicus Curiae in support of the Appellants of the State of Washington. Consent was granted by Appellants and was not granted by Appellees.

Movant Party has a special interest in the subject matter of this appeal, having devoted considerable time over the past several years to the construction and passage of Mississippi's statute banning the sale and distribution of obscene material. This statute is now on appeal in the United States Court of Appeals for the Fifth Circuit, having been struck down by the United States District Court, Northern District of

Mississippi, for its definitions of the terms "prurient interest" and "patently offensive." The definition of prurient interest in the Mississippi statute is very similar to the definition of that term in the statute of the State of Washington presently on appeal before this Court.

Section 1(8) of House Bill 626 of the State of Washington defines "prurient" as "that which incites lasciviousness or lust." Section 2(1)(a) of House Bill 345 of the State of Mississippi defines "prurient interest" as "a lustful, erotic, shameful or morbid interest in nudity, sex, or excretion." Both statutes include the word "lust" in the definitions.

Movant Party has worked closely as an adviser in the construction of the Mississippi statute. The language of the statute was taken from existing statutes

of other states and from decisions of the United States Supreme Court. MCDL assisted the Legislature with these definitions, and therefore MCDL feels compelled to inform the Court of the source of the legislation of the Mississippi statute because of the similarity between the definition of pruriency to that of the State of Washington. MCDL feels that the provision of its references would greatly support the validity and constitutionality of that part of the Washington statute which is like that of the Mississippi statute.

MCDL is a chapter of a national organization, Citizens for Decency through Law, Inc., Phoenix, Arizona, which is well known throughout the country for its effective legal counsel in the field of anti-obscenity legislation.

Counsel for Amicus is a practicing

attorney in the State of Mississippi and has been counsel for MCDL for approximately five years. Counsel, however, seeks to present an argument as to the definition of prurient interest from the viewpoint of a constitutional lawyer interested in the prosecution and not as a viewpoint held solely by MCDL.

It is sincerely hoped that this Court will grant this Motion for Leave to File a Brief Amicus Curiae and allow MCDL to participate in this very important case, for we believe this case presents important issues for all the people of

the United States as well as those of the State of Mississippi.

Respectfully submitted,

MISSISSIPPI CITIZENS
FOR DECENCY THROUGH LAW

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SUMMARY OF ARGUMENT

Amicus respectfully submits to the consideration of this Honorable Court that the definition of "prurient interest" is constitutional having been taken directly from decisions of the United States Supreme Court and the case law of other states. The conclusion that the term "lust" would permit the application of the statute to arguably protected

materials is not supported by the Supreme Court nor required by the Constitution. The Model Penal Code definition is not the only valid definition of prurience allowed by the Supreme Court, and this Court should not agree that the term is so limited. Neither is the contemporary usage of the word such that its connotation is nothing more than "sexual desire." The State of Washington therefore should be given the right to develop the concept of prurience within the guidelines of applicable law of her sister states and of the United States Supreme Court.

LAW AND ARGUMENT

THE DEFINITION OF PRURIENT INTEREST IS NOT UNCONSTITUTIONALLY OVERBROAD. PRURIENT INTEREST IS DEFINED AS THAT WHICH INCITES LASCIVIOUSNESS OR LUST AND IS NOT LIMITED TO AN APPEAL TO SHAMEFUL AND MORBID INTEREST.

The United States Court of Appeals,

Fifth Circuit, concluded that the only definition of prurient interest constitutionally valid is that given in Roth v. United States, 354 U.S. at 476, n.20, 77 Sup.Ct. at 1310, n.20 (1957). That footnote contained a section of the A.L.I.'s Model Penal Code which defined material as obscene "if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion. . . ." The Washington statute defined pruriency in Section 1(8) as "that which incites lasciviousness or lust." The Court of Appeals therefore concluded that the definition of obscenity as defined in the Washington statute was unconstitutionally overbroad.

The Court of Appeals had two main objections to the use of the term "lust" in the definition of pruriency: first, the A.L.I. definition pre-empted all

other definitions of term; and second, the modern usage of the term "lust" no longer implies shame, but it is synonymous with "sexual desire."

Miller v. California, 413 U.S. 15 (1973) is the landmark decision regarding the regulation of pornographic material. This decision does not define "prurient interest." It includes the word in the definition of obscenity. In Miller, supra, page 24, the Court said:

> "A state offense must also be limited to works where, taken as a whole, appeal to the prurient interest in sex, . . ."

This decision gave the basic guidelines for the trier of fact, which were:

> (a) Whether "the average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) Whether the work, taken as a whole, lacks serious literary,

> artistic, political, or scientific value." 413 U.S. at Page 25.

The Court was satisfied that these specific prerequisites would provide fair notice to a dealer so that he would not be prosecuted unfairly. It left to state law the definition of "prurient interest." This conclusion is inescapable when one reads from Miller, supra, at Page 31:

> Under a national Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." These are essentially questions of fact, and our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether "the average person, applying contemporary community standards" would consider certain materials "prurient," it would be unrealistic to require that the

> answer be based on some abstract formulation. The adversary system, with ... jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law.

The Court recognized that "godlike precision" in defining regulated materials would emasculate the power of the state and the Congress to address the problem of pornography. Miller v. California, supra, at Page 28. In discussing this problem of specificity, the Court cited in Footnote 20, United States v. Petrillo, 332 U.S. 1, 7-8 [91 L.Ed. 1877, 67 Sup.Ct. 1538], which said:

> "'. . . [T]he Constitution does not require impossible standards;" all that is required is that the language "conveys sufficiently definite warning as to the prescribed conduct when measured by common understanding and practices.'"

The only real definition of prurient interest offered by the Supreme Court is that in Roth v. United States, 354 U.S.

476 at 487 (1957). To assist in defining obscene material, the Court said that sex and obscenity are not synonymous, and the Court explained that "obscene material is material which deals with sex in a manner appealing to the prurient interest." In Footnote 20 the Court gave four examples of what it meant by "materials which deal with sex in a manner appealing to the prurient interest."

The first definition is the Court's own, which is the only one ever offered by the Supreme Court: "Material having a tendency to excite lustful thoughts."

The second example is from Webster's New International Dictionary (Unabridged, Second Edition, 1949), where pertinent parts of the definition are given of both "prurient" and "pruriency."

A third example is a cite from Mutual Film Corp. v. Industrial Com., 236 U.S. 230, 242, 59 L.Ed. 552, 559, 35 Sup.

Ct. 387, Ann.Cas. 1916 (C 296), and the fourth is that developed by A.L.I. Model Penal Code, Section 207.10(2) (Tent. Draft No. 6, 1957).

In citing the A.L.I. definition, the Court stated:

> "We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I. Model Penal Code. . . ." 354 U.S. 487 at 487.

It is reasonable to conclude that the Court in Roth, supra, meant only that the term "prurient interest," or "pruriency," was a term which could be defined by various courts in various ways within the parameters of the basic meaning of the word. The observation of the Court in Footnote 20 was not intended to develop all the nuances of the meaning of obscenity as required by the Constitution. To restrict the meaning of the term to the A.L.I. definition

misinterprets the intent of the Miller decision, supra, and is not supported by either case law or the plain meaning of the footnote as set forth above.

The case law to which the Miller court referred in Footnote 20 of the Roth decision, supra, supports the interpretation that material appealing to "prurient interest" can be described in other ways than "a shameful or morbid interest in nudity, sex, or excretion."

In Mutual Film Corp. v. Industrial Com., supra, at 242, this Court made the observation regarding the attraction of pornography to normal persons:

> They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a prurient interest may be excited and appealed to.

In Ginzburg v. United States, 383 U.S. 463 at 471 (1966), the interest is described as "the salaciously disposed."

On the next page, the Court said:

". . . they deliberately emphasized the sexually provocative aspects of the work in order to catch the salaciously disposed." (Emphasis added).

In Ginzburg v. United States, supra, Page 470, the Court observed:

"The deliberate exploitation of Petitioner's publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content." (Emphasis added).

In other cases material has been considered prurient if it is sexually stimulating. It can be either attractively erotic or repulsive. Edward Mishkin v. State of New York, 383 U.S. 502, at Page 508, states as follows:

". . . do not satisfy the prurient-appeal requirement because they do not appeal to a prurient interest of the 'average person' in sex, that 'instead of stimulating the erotic, they disgust and sicken.' We reject this argument as being founded on an unrealistic interpretation of the prurient-appeal requirement." (Emphasis added).

See also, Penthouse v. McAuliffe,

610 F.2d 1353 (5th Cir. 1980) where various material was described.

Material that is sexually provocative, if the purveyor's sole emphasis is on the sexually provocative aspect, has been used to describe the prurient interest. The trial court in Splawn v. California, 431 U.S. 595, at Page 598 (1977), instructed the jury:

> "If you conclude that the purveyor's sole emphasis is on the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter is utterly without redeeming social importance." (Emphasis added).

The courts have used the words "lewd" and "lascivious" to describe prurient interest in Roth, supra, Footnote 20. The words "tend to excite lasciviousness" are used in State v. Little Art Corp., 215 N.W.2d 853, 856 (Sup.Ct.Neb. 1974). The Court has used "tendency to excite lasciviousness" with lasciviousness being defined as the

tendency to arouse sexual desire in People v. Ciampa, 394 N.Y.S.2d 727, 732 (Sup.Ct.App.Dept. 1977). Prurient interest means in State v. Barrett, 292 S.E.2d 590, 591-592 (Sup.Ct.S.C. 1982) "a shameful and morbid interest in nudity, sex, or excretion and is reflective of an arousal of lewd and lascivious desires and thoughts."

It has also meant a "tendency to excite lustful thoughts," as well as "shameful and morbid." Spry v. State, 274 S.E.2d 2 (Ct.App.Ga. 1981). Prurient means "shameful and morbid," "excit[ing] lustful thoughts." State v. Little Art Corp., supra, at 856, and, as has already been pointed out in Roth, supra, Footnote 20, prurient interest means "having a tendency to excite lustful thoughts."

The word "prurient" means to be erotic. State v. Tidyman, 568 P.2d 666, 675 (Ct.App.Or. 1977); State v. Grabill,

579 P.2d 316, 320 (Ct.App.Or. 1977); Mishkin v. State of New York, supra, 508; Ginzburg v. U.S., supra, 470. Other state cases which discuss the meaning of prurient interest are State v. Lewitt, 222 A.2d 579, 582 (Ct.App.Conn. 1966); State v. Great American Theatre, 608 P.2d 951, 952-959 (Sup.Ct.Kansas, 1980); Little Store v. State, 453 A.2d 1215, 1216-17 (Ct.App.Md. 1983); Commonwealth v. Mascolo, 375 N.E.2d 17, 16 (App.Ct. Mass., 1978); Andrews v. State, 652 S.W.2d 370, 375-77 (Texas Ct.Cr.App. 1983), and State v. Schwing, 328 N.E.2d 379, 382 (Sup.Ct.Ohio, 1975).

In addition to the State cases in the foregoing list, the the following Federal cases serve to prove that the Washington definition of "prurient" is within the guidelines of the terms as used by the Supreme Court in other courts of the states and cannot be said to be

unconstitutionally overbroad as a matter of law.

Federal cases: U.S. v. 31 Photographs, 156 F.Supp. 350 (S.D.N.Y. 1957); U.S. v. Keller, 259 F.2d 54, 58 (3rd Cir. 1958); Eastman Kodak v. Hendricks, 262 F.2d 392, 397-98 (9th Cir., 1958); Flying Eagle Publications v. United States, 273 F.2d 799, 803 (1st Cir. 1960); U.S. v. Darnell, 316 F.2d 813, 816 (2d Cir. 1963); Interstate Circuit v. City of Dallas, 366 F.2d 590, 596 (5th Cir. 1966); Luros v. U.S., 389 F.2d 200, 203 (8th Cir. 1968); Childs v. State of Oregon, 431 F.2d 272, 275, 276 (9th Cir. 1970); U.S. v. One Reel of Film, 360 F.Supp. 1067, 1071-72 (D.Mass. 1973); U.S. v. Central Magazine Sales, 381 F.2d 821, 823 (4th Cir. 1967); U.S. v. Pinkus, 551 F.2d 1155, 1159-60 (9th Cir. 1977); and U.S. v. Battista, 646 F.2d 237, 245 (6th Cir. 1981).

The inescapable conclusion is that the Supreme Court has never required a national statutory definition of the term "prurient interest" or a specific judicial meaning of the term which precludes or disallows all other explications. The conclusion of the Appeals Court that Miller v. California, supra, refers solely to the definition offered in the A.L.I.'s 1962 Official Draft is not a reasonable or accurate interpretation of the language of that decision.

In addition to being in error regarding the legal definition of prurient interest, the Appeals Court is also in error regarding the contemporary usage of the word "lust." The Appeals Court concluded that contemporary juries would be "unlikely to connote [lust with] anything more than 'sexual desire.'" One of the bases it gave for this conclusion was Webster's Third New International

Dictionary (Unabridged, Third Edition 1976). The exact definition of lust quoted in that dictionary is as follows:

> "Sexual desire, especially of a violent self-indulgent character: Lechery, Lasciviousness."

The first meaning of the word, which generally refers to mere pleasure and gratification, is obsolete.

The definition of "lustful" from that same authority states that "lustful" means "inciting to sexual desire or imagination," and gives as synonyms the words "lascivious" and "obscene."

Both the words "prurient" and "lustful" have a derivation which implies lack of restraint. "Prurient" comes from the Latin word prurire meaning "to itch, long for, or be wanton," and from the Latin word pruna meaning "glowing coal." The word itself means "marked by restless craving; itching curiosity," or having or easily susceptible to lascivious thoughts

or desires, or intending to excite lasciviousness. It also has a derivation meaning "be signed, burns."

The derivation of the word "lust" comes from the Latin lascivus, meaning wanton or playful, but this meaning is now obsolete. What is left in modern usage is associated with extreme sexual desire, especially of the violent and self-indulgent character. The lack of restraint may be derived from "lustful," which originally meant in Latin "fond of leaping." It is now synonymous with "lechery," "lasciviousness," and "obscene."

The American Heritage Dictionary of the English Language, 1982 ed., Page 11, had an eminently outstanding usage panel who worked on the premise that good usage is clearly distinguished from bad usage and that the best people able to make the distinctions are the enlightened members

of the community. The definition of the word "lust" in both editions is given as "an intense and unrestrained sexual craving," and "an overwhelming desire or craving."

The Oxford English Dictionary and its Supplement, 1976 ed., give the chief current use of the word (noun) as "sexual appetite or desire, chiefly now exclusively implying intense moral reprobation, libidinous desire, degrading animal passion." From the examination of the history of this word in that authority, it is observed that in the past the word was associated with simply "pleasure or delight, or a desire, relish or inclination for something," but these meanings are now obsolete.

Materials which appeal to lust, therefore, are not materials which merely stimulate a "healthy" and "wholesome" sexual desire. They are materials which

arouse feelings that are likely to be indulged for self-gratification. Used in the sexual context, which is the most prevalent, it depicts powerful and unrestrained feelings. Indeed, the usage of the word in a non-sexual setting, as a "lust for power" evokes a person who goes to any length in an attempt to satisfy this intense desire. In both the sexual context and the "lust for power" context, it has none of the moral restraints that regulate our desires. It is the glowing coal of pruriency, not an innocuous sexual desire. Therefore, it is likely to burn those who are its object. It describes an animal feeling, not an admirable or normal interest in sex. It is a shameful interest.

The fact that President Carter admitted to "committing adultery in his heart many times" in no way proves that lust has an acceptable connotation. He

was describing frankly a shameful interest. A well-known born-again Christian, Mr. Carter was no doubt familiar with Matthew 8:28 which states: "Whoso looketh on a woman to lust after her hath committed adultery with her already in his heart." Since adultery to a born-again Christian is a sin, it is the obvious conclusion that the word "lust" is not expressive of a healthy, admirable Christian trait; and certainly President Carter was familiar with James 1:15 which states: "When lust hath conceived, it bringeth forth sin, and sin, when it is finished, bringeth forth death." President Carter was not bragging or explaining that everyone has a strong sex drive. He was advancing the Christian idea that we are all sinners, even the President of the United States.

The Appeals Court has fallen into the trap which we were warned about in

both the Roth and Miller courts that we should not conclude that sex and obscenity are the same. As far as obscenity law is concerned, the fact that President Carter wrote in Playboy Magazine that he had "committed adultery in [his] heart many times," merely points out that President Carter responds to sex and attractive women in a way that is morally forbidden. The attraction may or may not be prurient, but even if it were, neither his adulterous response nor the sexy women who caused it would be considered obscene, unless, of course, the activity in which they were engaged met all three (3) prongs of the Miller decision.

The fact is that our leading "couturiers, performers and manufacturers of soft drinks, soapsuds and automobiles" are, as the Appeals Court has pointed out, selling daily materials and performances which arouse lust. Most of these

materials and performances are not obscene in the legal sense because they do not meet the requirements of the Miller Court. Amicus would argue, however, that this type of material and performances with its appeal to the prurient interest of millions of people throughout this country is not a healthy appeal, and that, while this appeal has no doubt sold many products, it is one of the causes of the perversion of our normal sexual instincts to the morbid and shameful interest in sex, which is now expressing itself in the morbid and shameful activities of child abuse, incest, and rape.

Including the word "lust" in the definition of prurience does not, however, cause those products discussed above to be obscene, unless they meet other requirements of the Miller test, which are set forth in Miller, supra,

Page 24. Therefore the use of the word in the definition does not infringe on protected materials. The use merely explicates fully the definition of prurient interest. A modern jury may not understand an instruction which includes simply an appeal to the "prurient interest." It might not understand, either, the word "lascivious." A modern jury, however, would surely understand an instruction which told them that prurient interest is synonymous with lust. They would understand that materials which appeal to lust are those materials which arouse violent sexual desire devoid of the restraints generally imposed by a civilized culture on its sexual life.

To fully understand the definition of prurient interest, it is necessary to examine an argument regarding to where the appeal is to be made. Hamling v. United States, 418 U.S. 87 at Page 128

(1974). In Hamling petitioners argued that the District Court's instruction was improper because it allowed the jury to measure the material by its appeal not only to the average person but also to a clearly defined deviant group. It was agreed that, if some of the material appealed to the prurient interest of sexual deviants and some to the prurient interest of the average person, a general finding that the material appeals to a prurient interest is somehow precluded. The Court rejected the argument in Hamling, supra, Pages 128 and 129, and quoted Mishkin as follows:

> "Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. The reference to the "average"or "normal" person in Roth, . . . does not foreclose this holding. . . . We

> adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group; and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons, it also avoids the inadequacy of the most-susceptible- person facet of the [Regina v.] Hicklin [[1868] LR 3 QB 360] test. 383 U.S., at 508-509, 16 L.Ed. 56 (footnotes omitted). (Emphasis added).

As the above quotation illustrates, it is proper to instruct the jury that it may measure the material 'by its appeal to the prurient interest not only of the average person but also of a clearly defined deviant group." Hamling, supra, at Page 128.

Some confusion, however, has taken place regarding whether or not the appeal is to the prurient interest of the average person applying contemporary community standards or whether or not the average person, if the average person

applied those standards, would find the appeal to a prurient interest. Indeed, in Mishkin v. New York, supra, at Page 508 (1966) the Court said:

> Indeed, appellant's sole contention regarding the nature of the material is that some of the books involved in this prosecution, those depicting various deviant sexual practices, such as flagellation, fetishism, and lesbianism, do not satisfy the prurient-appeal requirement because they do not appeal to a prurient interest of the "average person" in sex, that "instead of stimulating the erotic, they disgust and sicken." We reject this argument as being founded on an unrealistic interpretation of the prurient-appeal requirement. (Emphasis added).

The guidelines of Miller, supra, however, stated that:

> "The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest." Miller v. United States, 413 U.S. 15 at Page 24 (1973). (Emphasis added).

And on Page 30 the same Court said:

> When triers of fact are asked to decide whether the 'average person applying contemporary community

> standards' would consider certain materials "prurient," it would be unrealistic to require that the answer be based on some abstract formulation." (Emphasis added).

And Roth, supra, at Page 489 stated that: "Whether to the average person, applying contemporary standards. . . ."

This concept is important because, as is plainly set out above, the appeal is not to an erotic interest, or to a shameful or morbid interest in an average person or in the jury. To misunderstand the nicety of law is to allow defense attorneys to gain acquittal on the basis of an instruction urging the jury to acquit the Defendant if the average person is unaffected by the material charged. This concept was discussed in Trial Magazine, Vol. 14, No. 5 (A.T.A.A., May, 1978) entitled "The Defense of an Obscenity Prosecution." The author recounted the tactics of gaining an acquittal by a Defendant charged with

selling bestiality films by arguing that if the films aroused the jury to participate in bestiality, then the Defendant was guilty, but if the jury found the materials repulsive and disgusting and not appealing to the sexual desires of the average person, then the Defendant was to be acquitted. It follows that the law on obscenity would be rendered ineffective if the Court charged a jury that they must find the matter obscene, if at all, only when it appeals or excites a shameful or morbid interest in an average person or in the jury.

In reference to Hamling, supra, where the question of appeals to prurient interest or sexual deviance was discussed, see State v. Tidyman, 568 P.2d 666, 674 (Ct.App.Or. 1977), where the question was discussed as to whether the appeal of material would be to a generally erotic or shameful interest in sex or whether

that interest was to an average person or that of a deviant class.

In addition to considering the concept of appealing to the prurient interest of the average person, the concept of the commercial exploitation of obscene material, or the concept of pandering, needs to be explored. Understanding the development of the pandering concept illustrates what is meant by prurience, rather than that term being limited to the "shameful and morbid."

Pandering is a term of art in obscenity law which deals with the exploitation of the prurient nature of the material rather than a legitimate interest in sex. In Miller, supra, at Pages 34 and 35, the Court discusses work which are protected by the First Amendment and contrasts the "free and robust exchange of ideas and political debate with exploitation of obscene material."

It said that "But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter." Clearly, the matter of commercial gain or pandering is a factor to be considered in assessing speech as unprotected by the First Amendment. The Court's development of the pandering concept illustrates that the motivation of the distributor is very much a part of obscenity law. "Certainly in a prosecution which, as here, does not necessarily imply suppression of the materials involved, the fact that they originate or are used as a subject of pandering is relevant to the application of the Roth test." Ginzburg, supra, at Page 470, 471. The development of this concept led the Court to conclude in Splawn v. California, 431 U.S. 595, Page 598 (1977):

There is no doubt that as a matter

> of First Amendment obscenity law, evidence of pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether the material is obscene.

This clearly is a reflection of the principles in Ginzburg v. United States, 383 U.S. at 466, in which it was concluded by the Court that it was viewing the material "against the background of commercial exploitation of erotica solely for the sake of their prurient appeal." The Court, quoting Roth v. United States, supra, at Page 495, described the advertising and promotion which took place in order to sell the material:

> ". . . each of the accused publications was originated or sold as stock in trade of the sordid business of pandering - 'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.'"

At Page 465 of Ginzburg, supra, the Court in explaining the reason that it admitted

as relevant the evidence of commercial exploitation of sex said that "Standing alone, the publications themselves might not be obscene."

In U.S. v. Pinkus, 436 U.S. 253 at 303-304 (1978), the Court made it clear that it would consider motivation as being relevant to the ultimate evaluation of the material:

> This was not a so-called finding instruction which removed the jury's discretion; rather it permitted the jury to consider the touting descriptions along with the material themselves to determine whether they were intended to appeal to the recipient's prurient interest in sex, whether they were "commercial exploitation of erotica solely for the sake of their prurient appeal," Ginzburg, supra, at 466, 16 L.Ed.2d 31, 86 S.Ct. 942, if indeed the evidence admitted of any other purpose. And while it is true the Government offered no extensive evidence of the methods of production, editorial goals, if any, methods of operation, or means of delivery other than the mailings and the names, locations, and occupations of the recipients, the evidence was sufficient to trigger the Ginzburg pandering instruction.

Other courts have applied this principle, as, for example, the Supreme Court of Indiana, which upheld the pandering instruction upon the evidence that the materials were sold from "adult" bookstores, clearly marked as such, and openly dealing in sexual devices, books and films of an explicit pornographic nature. Sedelbauer v. State, 428 N.E.2d 206, at 207-08 (Supreme Court of Indiana, 1981), cert.den. 455 U.S. 1035 (March 22, 1982).

The pandering concept and its relationship to pruriency is shown in the charge to the jury in Splawn, supra, at 598:

> If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter is utterly without redeeming social importance. (Emphasis added).

The Court referred to Ginzburg, supra, at Page 470.

> The deliberate representation of petitioners' publications as erotically arousing for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. (Emphasis added).

The Model Penal Code, Commentaries, supra, at 496-498, followed the Roth theory that determining the predominant appeal to prurient interest "necessarily entails an inquiry into what other appeal the material may have." This approach was the basis for the Supreme Court's recognition of the worth of evidence of "pandering" to judge materials obscene even if the material was not obscene without the commercial exploitation by the panderers. The Model Penal Code, Section 251.4(4)(e) had specifically provided for evidence of "pandering" to show "appeal to prurient interest, or absence thereof, in advertising or other promotion of the material."

The Model Penal Code also allowed

for the admissibility of evidence of "artistic, literary, .scientific, industrial or other merits of the material." Model Penal Code, Commentaries, Section 251.4(4)(e). The Miller court adopted the concept as well as that of recognition of the evidence of pandering. This does not mean that a jury should make a determination that "certain material either has or has not sufficient positive value to outweigh its objectionable aspects." Model Penal Code, Commentaries, supra, at 496-98. The A.L.I. rejected this type of evaluation because it felt that criminal juries should not have to deal with artistic sensibilities or artistic merit. Rather they allowed for evidence of "artistic, literary, scientific, or educational" value to determine what other appeal, if any, the material might have.

Clearly, therefore, commercial

exploitation of the interest in sex and the "artistic, literary, scientific or educational" value of the material, if any, are important ingredients of understanding the appeal to prurient interest.

CONCLUSION

Amicus submits that the case law and usage supports the inclusion of the word "lust" in the Washington statute and would pass constitutional muster by the Supreme Court. The language found overbroad by the Ninth Circuit of the United States Court of Appeals cannot be said to be unconstitutionally overbroad as a matter of law.

Amicus wishes to thank this Court for the opportunity to express the opinions herein and provide further precedents for this Court's consideration of this issue of great importance to the people of Washington and to the rest of

the States.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, hereby certify that on this ____ day of November, 1984, the original and 40 copies o the within Amicus Curiae Brief were deposited in the United States Post Office in Jackson, Mississippi, with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below-listed parties to the proceedings and that all parties required to be served have been served.

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Nos. 84-28 and 84-143

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IN THE

Supreme Court of the United States

October Term, 1984

No. 84-28

DONALD C. BROCKETT,

Appellant,

vs.

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Appellees.

No. 84-143

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

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Statement

The American Booksellers Association, Inc., the Association of American Publishers, Inc., the Council for Periodical Distributors Associations, the International Periodical Distributors Association, Inc., the National Association of College Stores, Inc., and The Freedom to Read Foundation (collectively referred to as the "*amici*") hereby respectfully move for leave pursuant to Rule 42 of the Rules of the Supreme Court of the United States to file the attached brief *amici curiae* in this case. While the consent of the attorneys for appellees has been obtained, the consent of the attorneys for appellants was refused.

The *Amici*

The *amici*'s members publish, produce, distribute, sell and lend books, magazines and other printed materials of all types, including those which are scholarly, literary, scientific and entertaining.

The American Booksellers Association, Inc. (ABA) is a trade association organized under the laws of the State of New York. It is the major national association of booksellers in the United States. ABA has approximately 5,200 members consisting of private book stores, department book stores, university book stores and chain book stores.

The Association of American Publishers, Inc. (AAP) is a trade association organized under the laws of the State of New York. It is a major national association in the United States of publishers of general books, textbooks

and educational materials. Its approximately three hundred and twenty-five members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of all general, educational and religious books and materials produced in the United States. These works are sold and distributed in all fifty states to schools, universities and libraries and through thousands of bookstores, department stores, drug stores, newstands and other outlets in towns, villages and cities.

The Council for Periodical Distributors Associations is an Illinois not-for-profit corporation. It is the national trade association for over five hundred independent local wholesale distributors of magazines, comic books, paperback books and newspapers in every state of the United States.

The International Periodical Distributors Association, Inc. is a trade association organized under the laws of the State of New York. It is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The National Association of College Stores, Inc. is a trade association composed of approximately 2,300 college stores located throughout the United States.

The Freedom to Read Foundation, a non-profit organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions wherein every citizen's First Amendment freedoms are fulfilled; to support the right of libraries to include in their collections and make available any work which they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens.

Interest of the *Amici*

The *amici* are all involved in some aspect of making reading material of all kinds available to the general public. For this reason, the *amici* have a continuing interest in the decisions of this Court involving the balancing of First Amendment rights, and restrictions on materials with sexual content, including obscene materials not protected by the First Amendment. The *amici*'s brief will indicate the impact of the legal principles involved upon those who publish, produce, distribute, sell and lend material which is not obscene. The *amici* have brought the same perspective to the Court in previous cases. *E.g., Vance* v. *Universal Amusement Co.,* 445 U.S. 308 (1980); *Lo-Ji Sales, Inc.* v. *New York,* 442 U.S. 319 (1979). The *amici* have learned from experience that, in an eagerness to attack the social harms perceived to stem from the prevalence and accessibility of sexually-related materials, state and city legislators and enforcement agencies frequently treat legitimate constitutionally-protected books and periodicals identically with those materials which are obscene and not protected. Unless the constitutionally mandated distinction is main-

tained and ready access is provided to federal courts to enforce it, First Amendment rights may be threatened and curtailed.

In view of the foregoing, the *amici* seek leave to file the attached brief.

Dated: Jan. 2, 1985

Respectfully submitted,

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On Appeal from the United States Court of Appeals For the Ninth Circuit

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BRIEF OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., NATIONAL ASSOCIATION OF COLLEGE STORES, INC., AND THE FREEDOM TO READ FOUNDATION, AS *AMICI CURIAE,* IN SUPPORT OF THE APPELLEES

The American Booksellers Association, Inc., the Association of American Publishers, Inc., the Council for Peri-

odcial Distributors Associations, the International Periodical Distributors Association, Inc., the National Association of College Stores, Inc., and The Freedom to Read Foundation (collectively referred to as the "*amici*") submit this joint brief, *amici curiae,* pursuant to Rule 42 of the Rules of the Supreme Court of the United States, in support of the appellees in Nos. 84-28 and 84-143, having submitted a motion for permission to file same.

Interest of the *Amici*

The *amici* are all involved in some aspect of making reading material of all kind available to the general public. For this reason, the *amici* have a continuing interest in the decisions of this Court involving the balancing of First Amendment rights and restrictions on materials with sexual content, including obscene materials not protected by the First Amendment. The *amici's* brief will indicate the impact of the legal principles involved upon those who publish, produce, distribute, sell and lend material which is not obscene. The *amici* have brought the same perspective to the Court in previous cases. *E.g., Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980); *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319 (1979). The *amici* have learned from experience that, in an eagerness to attack the social harms perceived to stem from the prevalence and accessibility of sexually-related materials, state and city legislators and enforcement agencies frequently treat legitimate constitutionally-protected books and periodicals identically with those materials which are obscene and not protected. Unless the constitutionally mandated distinc-

tion is maintained and ready access is provided to federal courts to enforce it, First Amendment rights may be threatened and curtained.

ARGUMENT

Federal courts should be immediately available to determine the validity of legislation challenged as violative of First Amendment rights.

Appellants argue that state courts should be "given the opportunity to first construe a state obscenity statute and then leave to the federal court the review of any remaining constitutional claims if necessary." (Appellant Eikenberry's Juris. Statement, p. 14). In support of appellants, the Solicitor General as *amicus* argues that the *Pullman* abstention doctrine should be applied in cases such as those before this Court. (*Amicus* Br. p. 15).

These arguments misapprehend the proper role of the federal courts in protecting First Amendment interests and gloss over the harmful, practical effects such a policy would have on the ability of publishers, distributors, and retailers of First Amendment-protected materials to challenge vague, overbroad or otherwise unconstitutional state and local legislation.

The Role of the Federal Courts:

It is well established that it is the duty of a federal court to decide federal questions presented to it. *See Wisconsin* v. *Constantineau,* 400 U.S. 433, 439 (1971); *Zwickler* v. *Koota,* 389 U.S. 241, 248 (1967); *McNeese* v.

Board of Education, 373 U.S. 668, 672 (1963). In the Act of March 3, 1875, the predecessor of 28 U.S.C. § 1331, Congress first conferred federal question jurisdiction on the federal courts, making the federal courts the primary tribunals for enforcement of federal rights, a role previously reserved for the state courts.

In an important study of federal courts, Frankfurter and Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (1928), the authors stated of the Act of March 3, 1875:

> Congress [in enacting the statute] gave federal courts the vast range of power which had lain dormant in the Constitution since 1789. These courts ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.

Id. at 65. The Court quoted this statement with approval in *Zwickler* v. *Koota* and made it clear that once a plaintiff has chosen to seek vindication of rights arising under the Federal Constitution or federal laws in federal court, his choice of forum must be respected:

> Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims.

389 U.S. at 248.

The duty of the federal courts to decide federal questions is particularly strong in the area of First Amend-

ment rights. *See Zwickler* v. *Koota,* 389 U.S. 241, 252 (1967); *Baggett* v. *Bullitt,* 377 U.S. 360, 378-79 (1964). As stated by the court in *Garvin* v. *Rosenau,* 455 F.2d 233, 239 (6th Cir. 1972), in reversing a district court's invocation of the abstention doctrine in a First Amendment case:

> That the First Amendment is the essence of democratic government and that free speech is fundamental to our society need no elaboration. Historically, the guarantees of this amendment have been closely guarded by the federal courts.

See also Long Island Vietnam Moratorium Comm. v. *Cahn,* 437 F.2d 344, 347 (2d Cir. 1970); *Medrano* v. *Allee,* 347 F. Supp. 605, 620 (S.D. Tex. 1972). The reason for this attitude is that the violation of First Amendment rights is a matter of public concern which transcends the interests of even the individual litigants. Furthermore, it is a recognition that the consequences of federal abstention are delay and needless expense. Such consequences themselves can impermissibly chill the exercise of First Amendment rights.

Baggett v. *Bullitt,* 377 U.S. 360 (1964), concerned a loyalty oath requirement for state employees and teachers which was challenged for vagueness and overbreadth. The defendant urged the Court to abstain from hearing the plaintiff's First Amendment challenges to the statute. The Court decided to hear the issue, emphasizing that the very act of refusing to hear the case would have a chilling effect upon the exercise of First Amendment rights:

> We also cannot ignore that abstention operates to require piecemeal adjudication in many courts . . .

> thereby delaying ultimate adjudication on the merits for an undue length of time, . . . a result quite costly where the vagueness of a state statute may inhibit the exercise of First Amendment freedoms. . . . Meanwhile, where the vagueness of the statute deters constitutionally protected conduct, 'the free dissemination of ideas may be the loser.'

Id. at 378-379 (citations omitted).

This principal was reaffirmed in *Zwickler* v. *Koota*, 389 U.S. 241 (1967), in which the Court held that a three-judge panel should have respected the plaintiff's choice of a federal forum for challenging the validity of a New York State statute which prohibited the distribution of anonymous handbills. The Court made clear that when substantial First Amendment questions are at issue, abstention is improper.

The principal argument made by appellants in this regard is that the state courts should have been given the opportunity to construe the reference to "lust" in the Washington statute. A very similar argument was rejected by the Court earlier this year in a case not involving the First Amendment. In *Hawaii Housing Authority* v. *Midkiff*, 104 S. Ct. 2321, 2327 (1984), the Court stated:

> In the abstract, of course, such possibilities [of limiting construction] always exist. But the relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts *might* render adjudication of the federal question unnecessary. Rather, 'we have frequently emphasized that abstention is not to be ordered unless the statute is of an uncertain nature,

> and is obviously susceptible of a limiting construction.' *Zwickler* v. *Koota*, 389 U.S. 241, 251 . . . (1967).

That statement is particularly applicable to cases such as these, involving First Amendment challenges.

Even if there is such ambiguity, in First Amendment cases the ambiguity itself may render the statute void for vagueness. *See NAACP* v. *Button*, 371 U.S. 415 (1963).

In those relatively few cases when there truly is an ambiguity subject to a reasonable limiting construction, or when there is a substantial state issue that might avoid the necessity of deciding the First Amendment question, the *Pullman* doctrine may be applied, but only if the federal court, retaining jurisdiction under *England* v. *Louisiana State Board*, 375 U.S. 411 (1964), enjoins enforcement of the ambiguous or apparently unconstitutional provisions pending the state court's decision. Only then will the First Amendment rights of those dealing in protected materials be safeguarded in the interim.

The Solicitor General in his *amicus* brief suggests that abstention was appropriate here because "the statute under attack is designed to employ the State's historical and powerful interests in 'the quality of life and the total community environment, the tone of commerce in the great city centers and, possibly the public safety itself' " (page 18), without even referring to the substantial federal interests in the upholding of First Amendment rights. Such state interests are, however, the basis of virtually every state statute which has been found to run afoul of the First Amendment with respect to sexually-related speech. The Solicitor General's position totally disregards the

preeminence of the First Amendment and the paramount obligation of the federal courts to protect and foster First Amendment values.

Further, whether or not to abstain is not a theoretical or abstract question; a decision to abstain has significant and dangerous practical ramifications.

Practical Effects:

The argument of appellants and the Solicitor General that appellees and persons like them be required to seek vindication of their First Amendment rights from state courts in the first instance has practical ramifications adverse to the exercise of First Amendment rights that demonstrate the fallacy of the argument. When state or local criminal laws which appear to encroach upon First Amendments rights are passed, law-abiding publishers, wholesalers, booksellers and other retailers such as the *amici* find themselves in an untenable position. They may await affirmative action by the state offering an opportunity to challenge or limit the offending legislation. However, such action may be far off, and, if, as is often the case, the prosecution is brought against a seller of *Miller*-type obscenity whose actions are clearly within the permissible scope of regulation, the defendant may be barred from asserting the legislation's unconstitutionality as to non-obscene material offered by the *amici*. (Certainly that is not the most sympathetic context for the constitutional arguments of a seller of non-obscene material to be raised).

Until the state courts resolve the constitutional issues, local pressure based on the offending legislation is exerted against the *amici* by police, prosecutors, mayors, etc., to

cease publishing, distributing, or selling materials believed by the *amici* to be constitutionally-protected, but believed by the state to be within the purview of the offending legislation. In the interim, publishers, distributors and retailers are ultra-cautious in the exercise of their First Amendment rights, for to be labelled a "pornographer" in a criminal prosecution has business and social ramifications that can never be overcome, even if First Amendment rights are ultimately vindicated. Retailers self-censor and cease stocking challenged materials. In some cases, such as supermarkets and other locations where printed materials are not the primary products, the safest response may be to cease stocking all books and periodicals.

Nor is it an answer to say that the *amici* can protect their rights by seeking a declaratory judgment in the state courts. The *amici* were among the plaintiffs in a recent case brought in the United States District Court for the Southern District of Indiana challenging the constitutionality of an Indianapolis, Indiana, feminist "civil rights" ordinance attempting to ban sexually-related materials conceded not to fall within the *Miller* guidelines. *American Booksellers Association* v. *Hudnut,* Cause No. IP 84-791C, (S.D. Ind., November 19, 1984) (Barker, J.). The District Court declared the ordinance blatantly unconstitutional on a number of grounds.

The consideration and passage of the Indianapolis ordinance had been accompanied by great emotion, politicking, etc. Rape victims and battered women testified in favor of the ordinance. "Church-going conservatives . . . turned out by the busload when the council considered the

issue." *Washington Post,* July 29, 1984, at A4. Contemporaneously, in Minneapolis, where a similar ordinance was under consideration, one woman attempted to immolate herself and 25 others were arrested after "a chanting, stomping demonstration" in the City Council building. *New York Times,* July 14, 1984, § 1, at 46. *See also New York Times,* July 12, 1984, § A, at 12.

Had the Indiana federal court not been available to plaintiffs, the case would necessarily have been brought in a state trial court. All of the state court judges before whom the case might have been heard were to stand for reelection in November 1984, and would have been under substantial political pressure with respect to the determination of that case. This cannot be the forum to which the vindication of First Amendment rights should be entrusted.

State courts, because they are often more susceptible to community pressures and because they are not as likely to be sensitive to federal constitutional issues raised by the First Amendment, may not be as ready as the federal courts to grant timely relief. Even a momentary chilling of First Amendment rights is prohibited by the First Amendment. *Elrod* v. *Burns,* 427 U.S. 347, 373 (1976).

Further, appellants' suggestion does not, as they imply, merely give the state courts an initial opportunity to decide the issue, subject to subsequent correction by the federal courts. Submission of these issues to a state court and determination by that court may bar federal examinations of the issues on the principles of res judicata or

collateral estoppel. Thus, for all practical purposes,* the federal courts, whose primary role is and should be the protection of federal rights, would be ousted from the opportunity to determine the scope of such rights. *See Allen* v. *McCurry,* 449 U.S. 90 (1980); *Kremer* v. *Chemical Construction Corp.,* 456 U.S. 461 (1982); *Haring* v. *Prosise,* 462 U.S. 306 (1983). Even if plaintiff desired to reserve its federal claims while litigating state issues, a posture that in most cases would not make sense and would only delay vindication of First Amendment rights, subsequent litigation in the federal courts of the unraised federal issues would also be barred. *See Migra* v. *Warren City School District Board of Education,* 104 S. Ct. 892 (1984).

CONCLUSION

For the reasons set forth above, we respectfully urge this Court not to extend the *Pullman* abstention doctrine in the area of First Amendment challenges such as those in the cases before the Court. We further urge that, in those few cases in which abstention may be appropriate (either because there is truly an ambiguity subject to a reasonable limiting construction or because there is a substantial state issue that might avoid the necessity of deciding the First Amendment question), the federal district court be required to follow the rule in *England,* retain jurisdiction and enjoin enforcement of the ambiguous or apparent unconstitutional provisions pending resolution of

* While this Court could ultimately review the determination on petition for certiorari, in light of the Court's caseload and ability only to grant certiorari in a minute percentage of the cases in which it is sought, that is a slim reed on which to rest First Amendment rights.

the state law issues. Only then will First Amendment rights appropriately be protected.

Respectfully submitted,

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Nos. 84-28 and 84-143

In The

Supreme Court of the United States

October Term, 1984

No. 84-28

DONALD C. BROCKETT,

Appellant,

vs.

SPOKANE ARCADES, INC., et al.,

Appellees.

No. 84-143

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Appellants,

vs.

J-R DISTRIBUTORS, INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR ALL APPELLEES

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QUESTIONS PRESENTED

1. Does the definition of "prurient" contained in Washington's obscenity statute — i.e. merely "that which incites lasciviousness or lust" — violate the guarantees for protected expression contained in the First and Fourteenth Amendments to the United States Constitution?

a. Is it constitutionally permissible for an obscenity law to contain no requirement that challenged material be found in violation of community standards of what is deemed shameful, morbid, unhealthy or unwholesome?

b. Is it constitutionally permissible for the term "prurient" in an obscenity law to be defined exclusively in terms of a value-neutral concept meaning nothing more than mere sexual stimulation or the arousal of sexual desire?

c. Is it constitutionally permissible in an obscenity law for the definition of "obscenity" to be similar to that contained in *Regina v. Hicklin*? Specically, does the lack of a requirement that the value judgments of the average person in the community be applied to the material "taken as a whole" rather than only to isolated excerpts comply with First Amendment standards?

d. Is it constitutionally permissible to define the term "prurient" exclusively in terms of the words "lasciviousness" or "lust," the predominant if not exclusive contemporary meaning of which is the value-neutral one of mere physical sexual arousal involving no necessary notion of disapproval, shamefulness or morbidity?

2. Is a First Amendment facial overbre 'th challenge to an obscenity law permissible where, as in the case at bar, all of the following circumstances are present:

a. An integral portion of the definition of obscenity which will necessarily be involved in *every* application of the statute is unconstitutional, both on its face and as interpreted by appellants, the state authorities charged with its enforcement;

b. There are *no* circumstances where the statute may be constitutionally applied because of its unconstitutional definition;

c. The statute establishes *severe* penalties for its violation including *unlimited* civil fines and criminal penalties including five year felony imprisonment, a *mandatory minimum* fine of $5,000.00 and a maximum fine of $50,000.00 for *each copy* of each distributed item found to be obscene;

d. The parties challenging the statute are asserting their own rights and not those of hypothetical non-litigant third parties.

3. Does a federal court abuse its discretion if it refuses to invoke *"Pullman"* abstention where plaintiffs challenging a facially unambiguous obscenity law allege that it infringes on protected First Amendment expression, where the challenge involves no uncertain issue of state law, where all parties (including the State's Attorney General) agree as to the legislature's intended meaning of the statute, and where, because of the law's severe penalty provisions, its overbreadth would have an extreme deterrent impact on protected expression until such time, if ever, as a saving state court construction is rendered?

PARTIES

Appellants: KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington; JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington; JEFFREY C. SULLIVAN, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington; FRED ANDREWS, in his official capacity as City Attorney for the City of Yakima, Washington; and NORM MALENG, Prosecuting Attorney of King County in his representative capacity only.

Appellees: J-R DISTRIBUTORS, INC.; AZURE ENTERTAINMENT CORPORATION OF WASHINGTON; JACK R. BURNS, in his representative capacity as EXECUTOR OF THE ESTATE OF SELOM F. BURNS; PLAYTIME THEATRES, INC., a Washington Corporation; KUKIO BAY PROPERTIES, INC., a Washington Corporation; SPOKANE ARCADES, INC., a Washington Corporation; THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON; MADRONA PUBLISHERS, INC., SUPERIOR PUBLISHING COMPANY; WASHINGTON LIBRARY ASSOCIATION; PACIFIC NORTHWEST BOOKSELLERS ASSOCIATION; MOTION PICTURES EXHIBITORS OF WASHINGTON, ALASKA, AND NORTHERN IDAHO; WASHINGTON STATE COUNCIL OF TEACHERS OF ENGLISH; WASHINGTON LIBRARY MEDIA ASSOCIATION; AND THE COMMUNITY COLLEGE LIBRARIAN and MEDIA SPECIALISTS ASSOCIATION OF WASHINGTON.

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Nos. 84-28 and 84-143

In The

Supreme Court of the United States

October Term, 1984

No. 84-28

DONALD C. BROCKETT,

Appellant,

vs.

SPOKANE ARCADES, INC., et al.,

Appellees.

No. 84-143

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Appellants,

vs.

J-R DISTRIBUTORS, INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR ALL APPELLEES

STATEMENT OF THE CASE

Appellees concur in the Statement of the Case contained in appellant Brockett's brief except for the sentence beginning on p. 6 and ending on p. 7 thereof, contending that the Court of Appeals compelled "only one" constitutionally acceptable definition of "prurient." While the Court of Appeals did conclude that "prurient interest"

means "a shameful or morbid interest in nudity, sex or excretion," the Court did not have before it, nor did it purport to reject, synonyms such as an "unhealthy" or "unwholesome" interest, which might be acceptable in a statutory definition of "prurient interest." Similarly, the Court of Appeals also did not disapprove legislation wherein "prurient interest" was left undefined.

Appellees also concur in parts A and B of the Statement of the Case in the Eikenberry brief but add that the penalty for violation of the Class C felony of "promoting pornography" is a maximum five-year prison sentence (per count) [*see* R.C.W. § 9A.20.020(1) (c) (as amended, 1981)] and a *mandatory minimum* fine of $5,000 *per count* with a potential maximum fine of $50,000 *per count* [*see* § 8 of House Bill 626 forth in Appendix A hereto].

Regarding the discussion of the Court of Appeals' opinion contained in part C of the Eikenberry brief's Statement of the Case, appellees assert the following:

1. The Court of Appeals, as noted by Eikenberry, "found that the connotations associated with the term 'lust' in 1957 were not necessarily applicable today." However, the Court of Appeals' support for this observation was somewhat broader than the reasons set forth in the Eikenberry brief. Specifically, the Court of Appeals noted that "the term 'lust' is generally perceived today" as "a healthy, wholesome, human reaction common to millions of well-adjusted persons in our society." *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 490-491 (9th Cir. 1984). The Court noted:

> "To the contemporary jury, 'lust' is unlikely to connote anything more than 'sexual desire.' *Webster's Third New International Dictionary* (Unabridged, 3d Ed., 1976); *see also The Random House Dictionary of*

the English Language (Unabridged, 1979) ('lust' defined as 'sexual desire or appetite')." 725 F.2d at 491.

2. After concluding that a contemporary jury given a mere "lust" instruction would not necessarily find the material shameful, morbid or unwholesome, the Court then relied upon substantial precedent holding that a "prurient" interest, as used in *Roth* and *Miller,* necessarily connotes an interest that is not only erotic, but is, in some way, shameful, morbid, unwholesome or unhealthy. Relying on the opinion in *United States v. 35 MM Motion Picture Film Entitled "Language of Love,"* 432 F.2d 705 (2nd Cir. 1970) *cert. denied,* 403 U.S. 925 (1971), the Court of Appeals stated:

> "We agree with the Second Circuit's conclusion 'that the Supreme Court has never intended to brand as "obscene" representations of sexual matters which do not import a debasing, "shameful or morbid" quality into the expression or depiction of human sexuality. To conclude otherwise would be to suggest that the human body and its functions are in themselves somehow "dirty" or unspeakably offensive.' [Citation omitted.] Such an argument is degrading, and, like the Second Circuit, we reject it. * * * Only by distinguishing between 'the arousal of sexual instincts and the perversion of those instincts to morbidity,' 432 F.2d at 712, can we ever hope to safeguard from state intrusion the already 'dim and uncertain' boundary surrounding protected First Amendment expression." 725 F.2d at 491-492.

3. Thereafter, the Court of Appeals disposed of appellants' *Pullman* abstention argument with the following discussion:

> "In this case, we find it crystal clear that the term 'prurient' as used in House Bill 626, includes 'lust.' It is not possible, under the statute, to give the term a

contrary meaning. The statute expressly incorporates the term 'lust' in its definition of 'prurient.' Consequently, a state court would either have to ignore the statutory definition completely or rewrite the statute in order to narrow its unconstitutional scope.

Since the state statute is not obviously susceptible to an interpretation that will avoid the federal constitutional issue raised by plaintiffs, it is our duty to decide the constitutional question presented. *See,* e.g., *Zwickler v. Koota,* 389 U.S. at 250-51, 88 S.Ct. at 396-97. *See also Aptheker v. Sec'y of State,* 378 U.S. 500, 515, 84 S.Ct. 1659, 1668, 12 L.Ed.2d 992 (1964) (statute held invalid because '[t]he clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting.'); . . . ." 725 F.2d at 493.

4. Finally, the Court addressed the question of whether plaintiffs had standing to bring an anticipatory challenge to the Washington statute based upon the overly broad definition of "prurient interest." See 725 F.2d at 485-487. Concluding that a facial challenge was permissible, the Court articulated its reasoning:

"To begin with, First Amendment freedoms 'are delicate and vulnerable' and the very 'threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.' *NAACP v. Button,* 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963). • • •

"Second, facial challenges are necessary because the alternative of awaiting the outcome of individual prosecutions in state courts does not adequately protect First Amendment freedoms. Aside from the enormously high costs and lengthy delays involved [citations omitted], a person thinking of engaging in protected behavior may be deterred from acting by the risk of conviction, even though his challenge might eventually be upheld. Consequently, the chill on protected activity deters those whose legal challenges are

> necessary to narrow an overly broad statute. Absent facial challenges to overbreadth, then, 'the contours of [a statute] would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the [statute's] proper scope.' *Dombrowski v. Pfister,* 380 U.S. at 487, 85 S.Ct. at 1121." 725 F.2d at 486.

Thereafter, the Court concluded that it was unnecessary for it to determine whether the statutory challenge met *Broadrick's* requirement of "substantial overbreadth" because the present case was "a challenge to a statute regulating pure speech" rather than to a statute regulating *both* speech and unprotected conduct. 725 F.2d at 487. Nothing in the Court's opinion remotely suggests that the challenge was *in*substantial or applicable to only a small number of cases. Quite to the contrary, the Court's discussion of the merits of the "prurient interest" issue makes clear that it deemed the statute to be substantially overbroad in that, in *every case,* juries[1] will be instructed under a definition which affords less protection to a defendant than that to which he or she is constitutionally entitled.

SUMMARY OF ARGUMENT

A. "Prurient Interest".

Section 1 (8) of Washington's Obscenity Statute ["the Statute"] defines "prurient" as "that which incites lasciviousness or lust." Accordingly, on its face, the Statute re-

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[1] The terms "juries," "jury" and "jurors" will be used herein as representative of all those whose decisions under the statute will be affected by its overbroad definition of "prurient." *All* others required to apply the statute—e.g., police, prosecutors and judges—will be similarly required to reach beyond constitutional limits. *See, Kolender v. Lawson,* — U.S. —, —, 103 S.Ct. 1855, 1858-1859 (1983).

quires juries to find that the first part of the 3-pronged test for obscenity is met if a viewer of the materials would experience a feeling of *either "lasciviousness"* or *"lust."* Whether there presently exists a commonly understood definition of "lust" or "lasciviousness" which necessarily implies a shameful, morbid, unhealthy or unwholesome interest, it is indisputable that at least one, if not the predominant or exclusive, understanding of those words in today's society is a value-neutral one, indicating mere physiological sexual arousal or desire. Thus, the Statute authorizes instructions which permit jurors to omit any necessary finding that the materials are deemed to be shameful, morbid, unhealthy or unwholesome as viewed by the average citizen in the community. Additionally, as indicated in their briefs, all appellants agree that the statutory term "prurient interest" means a "value-neutral" concept of mere physiological sexual stimulation or arousal.

As pointed out in the Solicitor General's amicus brief,[2] an obscenity statute violates the First Amendment if it fails to require a finding that the materials, taken as a whole, appeal to an unhealthy, unwholesome, shameful or morbid interest in nudity, sex or excretion. This Court's cases have consistently so held as has virtually every lower court to have addressed the issue.

Even more significantly, the Statute, in essence, suffers from many of the same constitutional defects as the English common law definition of obscenity embodied in

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[2] Appellees will consider only the Solicitor General's amicus brief of the many filed in connection with this appeal. Subsequent references to "Amicus" pertain exclusively to the Solicitor General and/or to his brief.

the rejected case of *Regina v. Hicklin,* L.R. 3 Queen's Bench 360 (1868). Under *Hicklin,* material was judged by the effect of *isolated excerpts* on the community's *most susceptible* viewer.

In order to reach an accommodation between the First Amendment's guarantee of free expression and society's interest in prohibiting obscene material, this Court in *Roth v. United States* [354 U.S. 476 (1957)], *rejected* the *Hicklin* obscenity test because its application would have too greatly restricted free expression. Specifically, *Roth rejected* the notion that obscenity could be determined by the effect of *isolated excerpts* within a given work. Instead, *Roth* held that *community standards* must be applied to the material *when viewed as a whole.*

Roth's requirement that community values be applied to the material when *viewed as a whole* was subsequently embodied in the "(a)" prong of the presently prevailing test for obscenity[3] set forth in *Miller v. California,* 413 U.S. 15 (1973). This requirement is not, however, reflected in the "(b)" prong of the *Miller* test because that prong does not require that the material be viewed "taken as a whole."

The Statute has eliminated the crucial requirement that the values of the community be applied to the material when the material is viewed *as a whole.*

Specifically, Washington has defined "prurient interest" exclusively in terms of a *value-neutral* concept of simple sexual stimulation or physiological arousal. Un-

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[3] Appellees' references to the "a," "b" and "c" prongs of the obscenity test pertain to the "prurient appeal," "patently offensive depiction" and "serious value" portions, respectively, of *Miller's* three part obscenity definition.

der the Statute, the "(a)" prong no longer fulfills the function of determining whether the material, taken as a whole, violates the values of the community. Appellants maintain that this is permissible because, they assert, these values are present in the Statute's "(b)" prong. However, neither *Miller* nor the Statute requires jurors to view the material "taken as a whole" when applying the "(b)" prong of the test for obscenity. To the contrary, community judgments of "patent offensiveness" are only applied with reference to *particular depictions* of sexual acts contained within a book, film or magazine, etc., and not to the *whole* of the work.

Since the (b) prong of the test does not purport, nor was it ever intended, to apply to the material "taken as a whole", the only place where community value judgments can be applied *when viewing the material taken as a whole* is in the "(a)" prong of the test. By eliminating the community's value judgments from the "(a)" prong of the test, Washington has enacted a scheme whereby community value judgments only come into play (under the "(b)" prong) when viewing *isolated excerpts* depicting sexual activity within a given work. This is *precisely* what this Court condemned in *Roth* by rejecting the test embodied in *Regina v. Hicklin, supra.*

B. Overbreadth.

Contrary to appellants' assertions, appellees' standing is based upon the statutory threat to *their own* First Amendment rights, rather than the rights of non-litigant third parties. Appellees therefore rely on "traditional" notions of standing rather than the "third party overbreadth standing" discussed in *Broadrick v. Oklahoma,* 413 U.S. 601 (1973).

Even if this Court concludes that the *Broadrick* "substantial overbreadth" requirement is applicable in the present case, appellees' challenge satisfies its requirements because, *in every case*, police will arrest, prosecutors will prosecute, and judges and juries will try defendants pursuant to a definition of obscenity which gives the potential defendant and the charged material less protection than guaranteed by the First Amendment. There are simply *no* circumstances in which this Statute may constitutionally be applied.

Moreover, this Court has previously held that "substantiality" [for purposes of overbreadth analysis] is also determined, in part, by the *degree of penalty* imposed by the challenged law. [*See New York v. Ferber*, — U.S. —, —, 102 S.Ct. 3348, 3363 (1982).] Unlike the situation in *Broadrick, supra*, [where the primary penalty for violation of the statute was dismissal from state employment—undisclosed "possible criminal sanctions" were also theoretically available], the Statute authorizes *unlimited* civil fines and *quite* substantial criminal *felony* penalties including a potential 5 year prison sentence (per count) and a statutorily required *mandatory minimum* fine of $5,000 *per count*, as well as a potential maximum fine of $50,000 *per count!* These extraordinarily *severe* penalties, coupled with an overly broad definition of obscenity, have a more than substantial chilling effect on appellees' exercise of their rights of free speech.

For all these reasons, should this Court apply the *Broadrick* test, it is nonetheless surely met herein.

C. Pullman Abstention.

Abstention under the doctrine of *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), is inapplicable in this case because none of the parties disputes the intended meaning of the statutory terms "lasciviousness" or "lust," nor is the statute vague or readily susceptible to a state court construction absent a substantial judicial rewriting of the statute. While a construction that reads "black" to mean "white" is always possible in *any* case, this Court has consistently held that the mere abstract possibility of a state court's rewriting its statute is not a sufficient reason to preclude a federal court from exercising jurisdiction over a federal question squarely presented. Moreover, since appellants' position in this Court is that the proper definition of "lasciviousness or lust" in the Washington statute is a "value-neutral" term meaning mere physical "sexual stimulation," there is little likelihood that, as a matter of statutory construction, a state court would adopt a different interpretation of the statute.

Furthermore, where, as here, civil rights plaintiffs allege that a challenged statute infringes and chills their First Amendment rights of free speech, this Court has consistently held that *Pullman* abstention is even less warranted because of the possibility that First Amendment rights will be chilled or destroyed during the period when a state court construction is being sought.

Finally, *Pullman* abstention is particularly inappropriate in a case of this type because this Court has held that even after a federal court has issued a *final* judgment enjoining enforcement of a statute, a state may bring a state court civil declaratory judgment action to seek a narrowing construction of the state statute and then re-

turn to federal court to seek a modification of the permanent injunction. Under this procedure, appropriate comity is achieved between the interests of the state in having an enforceable law and the interests of plaintiffs in protecting their First Amendment rights pending the ultimate resolution of all issues.

ARGUMENT

I

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT WASHINGTON'S OBSCENITY STATUTE VIOLATES THE GUARANTEES OF THE FIRST AMENDMENT.

A. The Positions of the Parties.

In this Court, appellants argue (1) that the constitutionally required concept of "prurient interest" does *not* involve a necessary element of shamefulness or morbidity (as perceived by the average person in the community applying contemporary standards) and (2) that the statutory definition of "prurient interest" as "lasciviousness or lust" was intended to eliminate any necessary finding of shamefulness or morbidity and, instead, to require only a finding of mere sexual arousal or stimulation. See the Eikenberry brief at p. 15:

> "'Prurient' thus means *that which incites sexual stimulation*. The statute should be read as the Washington legislature intended it to be read . . . ." (Emphasis added.)

Also, see the Brockett brief at p. 23:

> "The required appeal must heighten, exacerbate, or otherwise stimulate sexual longing or desire, without regard to whether the stimulated desire is wholesome or not . . . ."

Thereafter, at pp. 28-29, Brockett states:

> "The definition of 'prurient' found in Washington's anti-obscenity law, H.B. 626, meets the purpose of this prong by providing a textual definition towards physical stimulation, arousal, or a non-cognitive interest in sex."

Contrary to the requirements of both *Roth* and *Miller* that the values of the community be reflected in the application of the "prurient interest" portion of the test for obscenity, Brockett argues herein that "[t]he 'pruriency' factor is, therefore, value-neutral . . . ." [Brockett brief at 14.]

In sharp contrast to the position taken by appellants in this Court, the Solicitor General argues that the term "prurient interest" is constitutionally required to convey the concept of a "shameful or morbid" interest:

> "Any . . . formulation of the concept of 'prurience' [similar to that of the Model Penal Code] is acceptable, *as long as it connotes an unhealthy or unwholesome interest in sex.*" (Emphasis added.) Amicus' brief at 11.

However, contrary to the position taken by appellants, Amicus concludes that the statutory term "lust" *necessarily* will somehow be understood by the average juror as a "shameful or morbid interest."

Appellees agree with Amicus that the First Amendment requires that "prurient interest" must mean an interest in sex, nudity or excretion that is viewed as shameful, morbid, unhealthy or unwholesome by the average

citizen applying contemporary community standards. However, appellees disagree with Amicus' additional assertion that the unqualified terms "lasciviousness" or "lust" necessarily convey the concept of an unhealthy, unwholesome, shameful or morbid interest in sex to the average juror. Rather, it is appellees' position that both of these words are now commonly understood as "value-neutral" concepts meaning mere sexual arousal or physical stimulation. For this reason, appellees *concur* in appellants' position that the Legislature did not intend the statutory definition of "prurient" to convey any concept of shamefulness, morbidity, or other violation of community standards.

Whatever meaning the words "lasciviousness" and "lust" might be intended to convey in a hypothetical statute not before this Court, their meaning in *this* case is *fixed* by the interpretation given them by the Attorney General and the other appellants who read (and presumably intend to enforce) these terms as "value-neutral" concepts meaning mere "sexual stimulation" or "physical arousal" without any requirement of shamefulness or morbidity. Appellees submit that this Court must consider the meaning of the statutory term "prurient interest" (at least for purposes of this case) congruent with the way in which it is threatened to be enforced. Accordingly, appellees submit that the only issue properly before the Court in this case is whether it is constitutionally permissible for a state to define the term "prurient interest" exclusively in terms of mere value-neutral "physical sexual arousal" without any required consideration by the jury of whether the materials would be considered shameful or morbid in light of contemporary community standards.

Accordingly, there is no need for this Court to consider the separate issue raised by Amicus of whether the terms "lasciviousness" or "lust," might be deemed necessarily to include the concepts of shamefulness or morbidity should the issue ever arise in connection with *federal* obscenity legislation.

B. The Court of Appeals' Conclusion That a "Prurient Interest" is a "Shameful or Morbid" Interest Reflective of Each Community's Unique Values and Mores, is Compelled By The Present Status of the Law of Obscenity Vis-A-Vis the Term "Prurient Interest."

The Court of Appeals' conclusion that the term "prurient interest" was intended to communicate an erotic appeal which goes beyond the values of the community (i.e. beyond contemporary community standards as to what is or is not "shameful or morbid") is consistent with all of this Court's prior decisions, with the decisions of the numerous lower federal courts which have specifically addressed this issue, with the historical concept of obscenity as a "compromise between candor and 'shame'," with the A.L.I. Model Penal Code definition of obscenity and with the statutory definitions of obscenity of all but three of the 50 states.

This Court's first treatment of the subject of "prurient interest" appeared in its landmark *Roth* opinion. In *Roth*, this Court for the first time held that "obscenity" constituted expression not protected by the First and Fourteenth Amendments to the United States Constitution. However, in words particularly apposite to the present case, this Court cautioned:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-

> being of our free society and are indispensible to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. *It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.*" (Emphasis added) *Roth, supra,* 354 U.S. at 488.

The foregoing language indicates that at the time of *Roth* this Court considered the concept of "prurient interest" to be the primary determinant separating "obscenity" from constitutionally protected "speech" and that sexually oriented material *would* be protected if it did "not treat sex in a manner appealing to prurient interest." *Id.*

Although appellants contend that the constitutional concept of "prurient interest" is a "value-neutral" one involving mere "physical sexual stimulation" and nothing more, a careful reading of *Roth* does not support their position. First of all, *Roth* stated that "prurient interest" was to be measured by "contemporary community standards."[4] It is extremely significant to observe that when *Roth* first coined the concept of "contemporary community standards," there did not exist the subsequently added "patently offensive" portion of the test for obscenity. This is significant because it means that *Roth must* have intend-

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[4] The *Roth* test for obscenity was stated in the following terms: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S. at 489.

ed the concept of "prurient interest" to incorporate community value judgments of wholesomeness, etc., *because there was then no other prong of the test through which community value judgments might be applied!*

Indeed, the *Roth* opinion quoted with approval that portion of the trial court's jury instructions which stated to the jurors that "you and you alone are the exclusive judges of what the *common conscience of the community is,* and in determining that *conscience* you are to consider the community as a whole . . . ." 354 U.S. at 490 (emphasis added). The use of the term "common *conscience* of the community" is very instructive because it indicates that the referenced contemporary community standards were to reflect community *values.* Since the *only* application of the contemporary community standards requirement in *Roth* was to the concept of "prurient interest," the language referring to the "common conscience of the community" necessarily refutes appellants' argument that community attitudes and values play no part in the meaning of "prurient interest."

Further refutation of appellants' position comes from *Roth's* footnote 20. While appellants argue that "shamefulness and morbidity" play no constitutionally required part in the definition of "prurient interest," footnote 20 of *Roth expressly approved* the American Law Institute's Model Penal Code definition of obscenity defining "prurient interest" as "a shameful or morbid interest in nudity, sex, or excretion . . . ." 354 U.S at 487, n. 20. Accordingly, no matter what else might be said of this footnote, it expressly and necessarily recognized that shamefulness

and/or morbidity constituted *at least* one essential element of the meaning of "prurient interest."

Appellants make much of the first sentence of footnote 20 in *Roth* which recites a dictionary definition of "prurient interest" as "material having a tendency to excite lustful thoughts." However, a close reading of footnote 20 reveals that this Court's aim was to list not only the then-current dictionary definitions of "prurient," but also to discuss the judicial meaning given to that term in the "case law." This Court then *concluded* the footnote by approving the Model Penal Code definition, indicating that it does not significantly differ from that found in the "case law." However, at the end of footnote 20, as discussed *infra,* this Court referred to two pages[5] from the comments to the tentative draft of the Model Penal Code that make it quite clear that the Court understood that the A.L.I. definition was *substantially different* from the *dictionary definitions* appearing at the beginning of footnote 20 even though the A.L.I. definition was *not* considered substantially different from the "case law" definitions. In sum, it seems that this Court's inclusion of the world "lust" in footnote 20 was merely to show that "lust" or "sexual desire" was considered to be one of the necessary elements *subsumed* within the Model Penal Code definition. However, as indicated by the comments at page 10 of the tentative draft of the Model Penal Code (referred to at the conclusion of footnote 20), the concept of a "lustful interest," standing alone, was *rejected* as insufficient for the safeguarding of protected liberties.

The crucial language from the comments to the tentative draft which makes sense of the otherwise confusing footnote 20 is set out below:

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[5] Pages 10 and 29.

> "Obscenity is defined in terms of material which appeals predominantly to prurient interest in sexual matters . . . . *We reject the prevailing test of tendency to arouse lustful thoughts or desires* because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising and art . . . . * * * On the other hand, 'appeal to prurient interest' refers to qualities of the material itself: the capacity to attract individuals eager for a *forbidden* look behind the curtain of privacy *which our customs draw* about sexual matters." (Emphasis added.) A.L.I. Model Penal Code, § 207.10 (Tent. Draft No. 6, 1957), comment at 10.

The referenced language at p. 29 of the comments is even more supportive:

> "In specifying that the appeal must be to *prurient* interest, the proposed definition recognizes that there is a normal interest in sexual matters, for which it should be lawful to provide satisfaction through works of art as well as scientific and educational writings. The prurient interest is an *exacerbated, morbid, or perverted interest* . . . ." [Emphasis in original.] A.L.I. Model Penal Code, § 207.10 (Tent.Draft No. 6, 1957), comment at 29.

The reference to these crucial A.L.I. comments by the Court in *Roth* make it clear that this Court *rejected* any definition of "prurient interest" (such as Washington's) based *exclusively* on "lustful thoughts or desires." Rather, this Court included these comments to make clear that thereafter "prurient interest" should be understood to be a legal term of art meaning a shameful, morbid or "perverted" interest. Viewed in light of the A.L.I.'s emphatic *rejection* of a definition of "prurient interest" based *exclusively* on "lust," *supra,* the only plausible explanation of the term "lustful thoughts" appearing at the beginning of footnote 20 is that this Court concluded that a "lust com-

ponent" was *subsumed* within the approved A.L.I. definition of a shameful or morbid interest in sex.

In 1970, three years before this Court's landmark *Miller* decision, the Court of Appeals for the Second Circuit faced an argument identical to appellants' herein, i.e., that material appealing to a "prurient interest" need only have a sexually arousing impact and need not be found to appeal to a "shameful or morbid" interest. After analyzing footnote 20 in *Roth*, the Court similarly concluded that *Roth* had prospectively adopted the Model Penal Code definition:

> "We conclude, therefore, that the Supreme Court has never intended to brand as 'obscene' representations of sexual matters which do not import a debasing, 'shameful or morbid' quality into the expression or depiction of human sexuality. To conclude otherwise would be to suggest that the human body and its functions are in themselves somehow 'dirty' or unspeakably offensive. There is no logic in such a position, and we reject it." *United States v. 35 MM Motion Picture Film Entitled "Language of Love,"* 432 F.2d 705, 711 (2nd Cir. 1970).

Indeed, the facts in *Language of Love* indicate just how important is the distinction here at issue. The Court noted that all of the expert witnesses testified that none of the scenes of sexual activity in *"Language of Love"* appealed to a morbid or shameful interest in nudity or sex. 432 F.2d at 711. Nonetheless, the Court of Appeals viewed the film and observed that "[t]o the average person, certain scenes in *"Language of Love"* may present a temporary erotic appeal, and the effect may be temporary sexual arousal." *Id.* In ruling that the film was constitutionally protected, the Court concluded:

> "The erotic instinct and the apparent desire for sex education are in the ascendancy in our society, and in the sensitive area of constitutional adjudication of individual rights *we must be careful to distinguish between the arousal of sexual instincts and the perversion of those instincts to morbidity.* That, we believe, is essential to the wisdom of the Supreme Court's attempts to keep the 'door barring federal and state intrusion into [the area of First Amendment freedoms] tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests' . . . ." (Emphasis added) 432 F.2d at 712.

In 1973, this Court accomplished the monumental task of articulating, for the first time since *Roth,* a definition of obscenity concurred in by a majority. Under *Miller,* the new test was defined as follows:

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin, supra,* 408 U.S. at 230, *quoting Roth v. United States, supra,* 354 U.S. at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious, literary, artistic, political or scientific value." (Emphasis added) 413 U.S. at 24.

Although the meaning of the term "prurient interest" was not the focus of this Court's concern in *Miller,* nonetheless, two key portions of this Court's opinion indicate the correctness of those courts which have concluded that the term "prurient interest" was intended, in the constitutional sense, as an interest considered "shameful or morbid" in light of contemporary community standards. Firstly, the final sentence of footnote 2 of the *Miller* opinion refers with apparent approval to the A.L.I. Model Penal

Code's definition of obscenity contained in § 251.4(1) of the 1962 official draft:

> "§ 251.4 Obscenity
>
> (1) *Obscene Defined.* Material is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, *a shameful or morbid interest,* in nudity, sex or excretion . . . ." (Emphasis added). A.L.I. Model Penal Code § 251.4(1) (Official Draft, 1962).

Nowhere in *Miller* are any of the component elements of "prurient interest" from *Roth's* footnote 20 mentioned, nor is any definition of "prurient interest" mentioned other than the Model Penal Code's.

Secondly, in footnote 15 of the *Miller* opinion, this Court quotes with approval from Chief Justice Warren's concurring opinion in *Roth.* Appellees submit that this footnote strongly supports their foregoing interpretation of *Roth's* footnote 20:

> "In the apt words of Mr. Chief Justice Warren, the appellant in this case was 'plainly engaged in the commercial exploitation *of the morbid and shameful craving* for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. *That is all that these cases present to us, and that is all we need to decide.' Roth v. United States, supra,* 354 U.S. at 496 (concurring opinion)." (Emphasis added), *Miller v. California, supra,* 413 U.S. at 35, n. 15.

It is apparent that both Chief Justice Warren in *Roth,* and the majority of the Court in *Miller,* concluded that the *Roth* opinion necessarily was based upon the assumption that juries should make an evaluation of whether the materials in any obscenity case are "morbid and shameful" as measured by contemporary community standards.

Further support for the Court of Appeals' opinion is derived from *Smith v. United States,* 431 U.S. 291 (1977) where this Court focused extensively on the concept of "contemporary community standards." Although appellants herein contend that community value judgments should play no necessary part in evaluating "prurient interest," they cannot dispute that this Court unambiguously held in *Miller,* and reaffirmed in *Smith, supra,* that community standards *must* be considered in connection with *both* the "prurient interest" *and* "patent offensiveness" portions of the *Miller* test. However, if "prurient interest" means nothing more than mere "sexual stimulation or physical arousal" (as suggested by appellants) then the term "community *standards*" becomes mere surplusage vis-a-vis the concept of "prurient interest."

When *Miller* discussed the significance of "community *standards,*" it pointed out:

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found *tolerable* in Las Vegas, or New York City." (Emphasis added), *Miller v. California, supra,* 314 U.S. at 32.

Clearly, the community standards discussed in this portion of *Miller* were standards of community *toleration* of material. Obviously, what is deemed "tolerable" was to be gauged by applying the differing *attitudes* and *values* existing in different communities throughout the country.

Similarly, in *Smith v. United States, supra,* this Court pointed out that its opinion in *Hamling v. United States* [418 U.S. 87, 104-105 (1974)] recognized that

> "the function of 'contemporary community standards' in obscenity cases[, like] 'reasonableness' in other

> cases[, is that it entitles a juror] to draw on his own knowledge of *the views* of the average person in the community . . . ." (Emphasis added), *Smith v. United States, supra,* 431 U.S. at 302.

Obviously, the phrase "the views" as used in this quotation refers to a "value laden" judgment based upon the values of the vicinage. [By contrast, appellants' definition of "prurient interest" dispenses entirely with the values of the community vis-a-vis the "prurient interest" portion of the test.] This Court's Smith opinion then points out that these community "views" are just as pertinent to the "prurient interest" portion of the test as they are to the "patent offensiveness" portion of the test:

> "It would be just as inappropriate for a legislature to attempt to freeze a jury to one definition of reasonableness as it would be for a legislature to try to define the contemporary community standard *of appeal to prurient interest* or patent offensiveness, if it were even possible for such a definition to be formulated." (Emphasis added), *Smith v. United States, supra,* 431 U.S. at 302.

After recognizing that community standards of "prurient interest" and "patent offensiveness" are questions for the jury to decide in its traditional role as fact finder" (431 U.S. at 308), *Smith* upheld the trial court's evidentiary ruling allowing the jury to be informed that Iowa's *state* obscenity statute prohibited obscenity only if sold or exhibited to minors. This Court concluded that the local statute was relevant to the question of "contemporary community standards" because it "provides relevant evidence *of the mores of the community* whose legislative body enacted the law." (Emphasis added) 431 U.S. at 307-308.

In summary, this Court's opinions have consistently treated the concept of "contemporary community stan-

dards" as involving value judgments based upon community mores and have consistently held that these standards should be considered with reference to the question of whether material appeals to a "prurient interest." Since the concept of "contemporary community standards" originated in *Roth*, long before there was any requirement for a finding of "patent offensiveness," there can be no question that community value judgments have always been deemed necessarily inherent in the concept of "prurient interest."

The foregoing conclusion has also been reached by every lower federal court and the vast majority of state courts which have considered this issue. *See*, e.g., *United States v. 35 MM Motion Picture Film Entitled "Language of Love," supra*, 432 F.2d 705, 711-712 (2nd Cir. 1970) [where the Second Circuit concluded that this Court's use of the term "prurient interest" was "never intended to brand as 'obscene' representations of sexual matters which do not import a debasing, 'shameful or morbid' quality into the expression or depiction of human sexuality"]; *Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353, 1363-1364 (5th Cir. 1980) [interpreting *Roth* and *Miller* as adopting the A.L.I. Model Penal Code definition of "prurient interest" as "a shameful or morbid interest in nudity, sex or excretion."]; *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1026 (5th Cir. 1981), *cert. denied sub nom Theatres West, Inc. v. Holmes*, 455 U.S. 913 (1982) [sustaining against constitutional challenge a Texas statute using the term "prurient interest" without further definition but, nonetheless agreeing that that term in fact means "shameful and morbid"]; *Haldeman v. United States*, 340 F.2d 59, 62, n. 5 (10th Cir. 1965) [concluding that *Roth* required that a "prurient interest" be defined as a "shameful or

morbid interest in sex" and applying that definition in prosecution under the *federal* obscenity statute]; *United States v. Hamling,* 481 F.2d 307, 321 (9th Cir. 1973), aff'd, 418 U.S. 87 (1974) [jury instructed that a "prurient interest" is a "shameful or morbid interest in sex" in prosecution under federal obscenity statute]; *Goldstein v. Allain,* 568 F.Supp. 1377, 1385-1386 (N.D. Miss. 1983) [preliminary injunction issued enjoining enforcement of new Mississippi obscenity statute defining "prurient interest," *inter alia,* as merely a "lustful" or "erotic" interest]; *Community Television of Utah v. Roy City,* 555 F. Supp. 1164, 1169, n. 23 (D. Utah 1982) [distinguishing between the term "prurient interest" used in *Miller* and the term "arousing sexual interest" used in the ordinance stricken in that case]; *Little Store, Inc. v. State of Maryland,* 453 A.2d 1215 (Md. 1983) [reversing an obscenity conviction where the trial court's jury instructions defined "prurient" as a "tendency to excite [a] normal lustful interest in sex," *id.* at 1217]; *Leach v. American Booksellers Ass'n., Inc.,* 582 S.W.2d 738, 749-750 (Tenn. 1979) [concluding that *Roth* and *Miller, supra,* used the term "prurient interest" with reference to an interest in sex which was considered either "shameful or morbid"]; *State of Kansas v. The Great American Theatre Co.,* 227 Kan. 633, 608 P.2d 951 (1980) [where the Kansas Supreme Court, in rejecting a proposed jury instruction which would have defined prurient interest exclusively as "an appeal to sexual desire" concluded that this Court "meant something more than merely an appeal to sexual desires when it discussed the element of prurient appeal," *id.* at 640]; and *Andrews v. State of Texas,* 652 S.W.2d 370, 389 (Tex.Cr.App. 1983) [concluding that a properly instructed jury in Texas — where the statutory term "prurient interest" is undefined — would have to

make a finding that the material appeals to "such a shameful or morbid interest in sex as to be prurient," *id.* at 389]. *See also* 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 62.06 (3d ed. 1977) ["the principal appeal • • • must be to a morbid interest in sex, as distinguished from a candid interest in sex"].

Similarly, the Court of Appeals' ruling below is also consistent with this Court's recognition that the historical conception of obscenity is "the present critical point in the compromise between candor and *shame* at which the community may have arrived here and now." (Emphasis added), *Smith v. United States, supra,* 431 U.S. at 301, n. 7, quoting from *United States v. Kennerley,* 209 F. 119, 121 (S.D.N.Y. 1913) (L. Hand, J.). *See also,* e.g., the concurring opinion of Justice Harlan in *Smith v. California,* 361 U.S. 147, 171, n. 2 (1959) and *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102,* 709 F.2d 132, 137 (2nd Cir. 1983).

Similarly, the Court of Appeals' ruling is consistent with every A.L.I. Model Penal Code draft definition of "prurient interest" since *Roth.*

The Court of Appeals' determination that a "prurient" interest is not the same as mere "sexual arousal" is also supported by the statutes of a vast majority of the 50 states. While many state statutes define a "prurient interest" specifically as a "shameful or morbid" interest,[6]

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[6] *See,* e.g., Cal. Penal Code § 311(a); Fla. Stats. Ann. § 847.07(2) (a); Code of Ga. Ann. §26-2101(b) (1) [but *see Spry v. State,* 156 Ga.App. 74, 274 S.E.2d 2, 5 (1980) purporting to permit a jury instruction simply using the term "lust"]; Idaho Code § 18-4101(B); Ill. Ann. Stats. Chapt. 38, § 11-20(b); Code of Laws of S.C. § 16-15-260(b); S.D. Codified Laws § 22-24-27 (12); Tenn. Code Ann. § 39-6-1101(8) and Code of Va. § 18.2-372.

the majority of state statutes (either as written or as construed) include the term "prurient interest" but leave it undefined.[7]

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[7] Unless otherwise noted, all of the following states have obscenity statutes which, either as written or as authoritatively construed, utilize the phrase "prurient interest" but do not otherwise further define it: Code of Ala. § 13A-12-150(1) (a); Ariz. Rev. Stats. § 13-3501-2(a); Ark. Stats. § 41-3585.1(4) (b); Colo. Rev. Stats. § 18-7-101(2) (a); Conn. Gen. Stats. Ann. § 53a-193(a); Del. Code Ann. Title 11 § 1364(1); Hawaii Rev. Stats. § 712-1210(6) (a); Ind. Stats. Ann. § 35-49-2-1(1); Iowa Code Ann. Vol. 55 § 728.4; Kan. Stats. Ann. § 21-4301(2) (a); Ken. Rev. Stats. § 531.010(3) (a); La. Stats. Ann. § 14:106A(3); Maine Rev. Stats. Ann. Title 17 § 2912-2B(1); Ann. Code of Md. Art. 27, § 418 [note: this statute simply uses the word "obscene" but was construed (in *Little Store, Inc. v. State*, 453 A.2d 1215 (Md. 1983)) to require proof of a shameful or morbid interest rather than a mere "lustful interest"]; Mass. Gen. Laws Ann. Chapter 272 § 31; Mich. Stats. Ann. § 28.575(1) and (2) [as construed in *People v. Neumayer*, 405 Mich. 341, 275 N.W.2d 230 (Mich. 1979)]; Minn. Stats. Ann. § 617.241(1) (a); Ann. Mo. Stats. § 573.010(1) (a); Mont. Code Ann. § 45-8-201 (2) (b) (i); Rev. Stats. of Neb. § 28-807(9) (a) [* note: see explanation at end of this footnote]; Nev. Rev. Stats. § 201.235-4 (a); N.J. Stats. Ann. § 2C:34-2-a(1) (c); N.M. Stats. § 30-38-1-B (1); N.Y. Penal Law § 235.00-1(a); Gen. Stats. of N.C. § 14-190.1 (b) (2); N.D. Century Code § 12.1-27.1-01-4-a; Ohio Rev. Code Ann. § 2907.01(F) (1-5) [as construed in *State v. Burgun*, 56 Ohio St.2d 354, 384 N.E.2d 255, 261 (Ohio 1978)]; Okla. Stats. Ann. Title 21 § 1024.1-1 and -2(c); Ore. Rev. Stats. § 167.087 (2) (b); Pa. Consol. Stats. Ann. Title 18 § 5903(b); Gen. Laws of R.I. § 11-31-1; Tex. Codes Ann. Title 9 § 43.21(a) (1) (A); Utah Code Ann. § 76-10-1203(1) (a); Vt. Stats. Ann. § 2801(6) (A) [note: this statute only prohibits dissemination of matter "harmful to minors" and, in that context, refers to material which "appeals to the prurient, shameful or morbid interest of minors"]; W.Va. Code § 61-8A-1(7) (a); Wis. Stats. Ann. § 944.21(1) (a) [note: this statute simply uses the word "obscene" with no further definition; however, it was held unconstitutional and unenforceable by the Wisconsin Supreme Court in *State v. Princess Cinema of Milwaukee, Inc.*, 96 Wis.2d 646, 292 N.W.2d 807 (Wis. 1980)]; Wy. Stats. § 6-4-301(a)-(iii) (A).

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Of the 50 states, only 3 supply specific definitions of the term "prurient interest" which do not expressly require a finding of a "shameful or morbid" interest.[8] Of these 3 states, two permit a finding of "prurient interest" based upon a mere showing of "lust,"[9] and one defines a prurient interest as "an interest in lewdness or lascivious thoughts."[10]

(Footnote continued from previous page)

*Both the Attorney General's Jurisdictional Statement (at p. 11) and Judge Wallace's dissent in the Ninth Circuit's opinion herein [see p. A-37 of Appendix "A" attached to the Jurisdictional Statement filed by the Attorney General in # 84-143] state that Nebraska's statute defines "prurient interest" as the excitation of "lustful thoughts." However, subsequent to the 1964 statute quoted by Judge Wallace and the Attorney General, the Nebraska Legislature specifically *changed* the definition of "prurient interest" to eliminate any reference to "lustful thoughts" or "lust." Under the new statute, Neb. Rev. Stat. § 28-807(9), the statute refers to material which "appeals to the prurient interest or a shameful or morbid interest in nudity, sex or excretion . . . ."

[8] *See* Miss. Code Ann. § 97-29-103(1) (a); New Hamp. Rev. Stats. Ann. Chapt. 650:1-IV(a); and Rev. Code of Wash. Ann. § 7.48A.010(8).

[9] Miss. Code Ann. § 97-29-103(1) (a) defines a "prurient interest" as "a *lustful, erotic,* shameful *or* morbid interest in nudity, sex or excretion." (Emphasis added.) [In *Goldstein v. Allain, supra,* 568 F.Supp. 1377, 1385-1386 (N.D.Miss. 1983), app. pending, the Court issued a preliminary injunction against enforcement of the Mississippi statute.] Of course, the Statute herein at issue defines the term "prurient" as "that which incites lasciviousness or lust."

[10] New Hamp. Rev. Stats. Ann. Chapt. 650:1-IV(a).

C. Adoption Of The Washington Statutory Definition Of Obscenity Would Undermine 28 Years Of Supreme Court Opinions By Sanctioning A Return To The Rejected Hicklin Test Which Did Not Require The Application Of Community Standards To The Material "Taken As A Whole" But, Instead, Focused On The Effect Of "Isolated Excerpts" On The Most Susceptible Individuals In The Community.

In addition to its holding that "obscenity" is not constitutionally protected speech, the other equally significant portion of the *Roth* opinion was that it rejected the English common law definition of obscenity as it had been articulated in the then-leading case of *Regina v. Hicklin,* L.R. 3 Queen's Bench 360 (1868). In *Smith v. United States, supra,* this Court recently summarized the importance of *Roth's* rejection of the *Hicklin* test:

> "The phrase 'contemporary community standards' was first used in *Roth v. United States,* [*supra*]. * * * The *Roth* Court explained the derivation and importance of the community standards test as follows:
>
> > 'The early leading standard of obscenity allowed material to be judged merely by the effect of an *isolated excerpt* upon particularly susceptible persons. *Regina v. Hicklin,* [1868] L.R. 3 Q.B. 360. Some American courts adopted this standard but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominent theme of the material *taken as a whole* appeals to prurient interest. The *Hicklin* test, judging obscenity by the effect of *isolated passages* upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. * * *' "

(Emphasis added), *Smith v. United States, supra,* 431 U.S. at 300, n. 6.

When *Miller* articulated the current 3-part test for obscenity, it reaffirmed *Roth's* rejection of *Hicklin* by holding that a state could not define obscenity without guaranteeing that the values of the community would be applied to the material *when viewed as a whole.*

Under the *Miller* test, "contemporary community standards" are applied to the first 2 of the 3 parts of the test for obscenity, i.e., "the prurient interest" test and the "patent offensiveness" test. However, what is of critical importance is that *only* the "prurient interest" prong requires that community standards be applied to the material *when viewed as a whole.* By contrast, the "patent offensiveness" portion of the test applies only to *particular depictions* within a given work.[11]

Since *Miller* did *not* require that the "patent offensiveness" portion of the test be judged with reference to the work "taken as a whole," it seems likely that the function of the "(b)" portion is to provide *notice* to disseminators of media materials of the types of conduct which, if represented in a manner beyond the tolerance of a community's standards, *could* subject them to prosecution if the other two portions of the obscenity test are met. Accordingly, the *only* portion of the test which incorporates *Roth's* repudiation of *Hicklin* is the "prurient interest" portion of the test,

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[11] Under *Miller's* "(b)" prong, a juror must engage in a 2-tiered inquiry. First, the juror must determine whether there are any representations of sexual acts as defined in the applicable law contained within the subject work. If the work *does* contain one or more such representation(s), then the second inquiry is whether any of these *isolated* representations is presented in such a way that it exceeds the limits of the community's tolerance and is thus "patently offensive" as measured by contemporary community standards.

because it is only that portion which requires that contemporary community standards be applied to the material *when viewed as a whole.*

The Statute, both on its face and as interpreted by appellants, permits juries to conclude that the "(a)" portion of the test has been met upon a mere showing of "sexual stimulation" without any requirement of finding that the material, when viewed as a whole, appeals to an interest that the average member of the community would consider either shameful, morbid, unhealthy or unwholesome. The critical absence of this requirement from the statutory definition makes Washington's test little different from the *Hicklin* test which lacked any requirement that community standards and values be applied to the material *when viewed as a whole.*

Furthermore, contrary to the apparent suggestion at p. 18 of the Eikenberry brief, the Statute is facially quite clear that material is to be considered "as a whole" *only* under the "prurient interest" and "serious value" portions of the test and *not* under the "patent offensiveness" portion of the test. [A copy of the statute is attached for convenience as Appendix A hereto.]

D. Approval Of Washington's Statute Would Undermine The Settled State Of The Law Of Obscenity, The Creation Of Which Was Miller's Primary Achievement.

In the nearly two decade period between *Roth* and *Miller, supra,* there was unprecendented confusion on the part of both lawmakers and courts throughout the country involving the "intractable problem of obscenity." After *Miller* imposed its "clarifying gloss," there was substantial litigation prompted by the enactment of new obscenity

laws or the judicial construction of old ones. Thereafter, however, a comfortable *status quo* emerged grounded on general acceptance of and familiarity with the *Miller* formulation and its related legal terms of art.

As noted by both appellees and Amicus, the term "prurient interest" now has a well settled judicial meaning as a "shameful or morbid interest" in sex, nudity or excretion.

If this Court were now to redefine "prurient" to eliminate any requirement of perceived "unhealthiness," "unwholesomeness," "shamefulness" or "morbidity," it is likely that most obscenity legislation would again be revised resulting in new rounds of seemingly endless litigation around the country. Although such a result would be beneficial to lawyers, it would substantially undermine the extraordinary homeostasis brought about by *Miller*.

E. Even If This Court Were To Find A Legislative Intent That The Words "Lasciviousness or Lust" Meant A "Shameful or Morbid" Interest (Thereby Interpreting A State Statute Contrary To The Interpretation Given That Statute By State Enforcement Authorities), The Statute Would Still Be Unconstitutional Under The Rule Of Stromberg v. California, 283 U.S. 359 (1931).

As discussed in part A of this Point of Argument, appellants have interpreted the statutory terms "lasciviousness" or "lust" to mean "sexual stimulation," and in so doing have removed from the "a" prong the consideration of whether the average person, applying contemporary community standards, would find the material to be unhealthy, unwholesome, shameful or morbid. As appellants will presumably enforce the Statute consistent with their interpretation of it, their interpretation is controlling in this appeal.

However, if this Court were to reject appellants' stated interpretation and instead interpret the Statute's definition of "prurient" to include some meanings *beyond* mere "sexual arousal,"[12] Amicus' position must then be considered. Specifically, Amicus argued that a jury instructed to define "prurient interest" as "lasciviousness or lust," would *necessarily* conclude that its determination was to be based upon whether the material taken as a whole, would be considered shameful, morbid, unhealthy or unwholesome in light of contemporary community standards. Appellees respectfully submit that the Court of Appeals' treatment of this argument is dispositive. Specifically, whatever meaning the terms "lust" and/or "lasciviousness" may have had in 1957 when *Roth* was decided, they are today considered as "expressing a healthy, wholesome reaction common to millions of well-adjusted persons in our society." 725 F.2d at 490. As the Court also noted:

> "To the contemporary jury, 'lust' is unlikely to connote anything more than 'sexual desire.' *Webster's 3d New International Dictionary* (Unabridged, 3d Ed., 1976); *See also, The Random House Dictionary of the English Language* (Unabridged, 1979) ('lust' defined as 'sexual desire or appetite')." *Id.* at 491.

The Court of Appeals' conclusion that in contemporary usage "lust" no longer necessarily connotes a "shameful or morbid" interest was also reached by the court in *Goldstein v. Allain, supra,* 568 F.Supp. at 1385:

> "The inclusion of the terms lustful and erotic [in the Mississippi anti-obscenity statute's definition of prurient interest] would permit the application of the

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[12] *But see United States v. Thirty Seven Photographs,* 402 U.S. 363, 369 (1971) where this Court held that federal courts do not have the power to authoritatively construe state statutes.

statute to arguably protected materials. Such an intrusion into the area of protected speech is impermissible."

Similarly, the contemporary dictionary definition of the word "lascivious" is:

"1. Of or marked by lust. 2. Exciting sexual desires." *Webster's II New Riverside University Dictionary*, p. 678 (1984).

As shown above, both the relevant dictionary definitions of the words "lust" and "lasciviousness" and the understanding of those words by the lower courts which have considered the issue are that, in contemporary usage, the terms no longer necessarily connote a shameful, morbid, unwholesome or unhealthy interest in sex.[13] Rather, as argued by appellants, they connote mere "sexual stimulation" or "physical desire" which *may also* be deemed to be "shameful" or "morbid" in light of contemporary community values but which will not *necessarily* be so. Amicus' failure to recognize that vast segments of our pluralistic society no longer necessarily find all media which induce feelings of physical arousal to be "shameful" or "morbid"[14] compels the rejection of his argument that a jury instructed in terms of "lasciviousness" or "lust"

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[13] As the Chief Justice recently observed in his dissenting opinion in *Board of Education (Island Trees) v. Pico*, 457 U.S. 853, 885 (1982): "The First Amendment, as with other parts of the Constitution, must deal with new problems in a changing world."

[14] Consumption of sexually oriented materials by Americans is unquestionably in the range of hundreds of millions of units annually, and the number of consumed units will apparently increase significantly in years to come. Evidence of these phenomena—in at least one medium—was contained in many

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national magazine articles in 1984 (e.g. "VCRs: Coming On Strong," TIME Magazine, December 24, 1984 (pp. 44-50); "The Crowded New World of TV," FORTUNE Magazine, September 17, 1984 (pp. 156-166); "The Video Revolution" NEWSWEEK Magazine, August 6, 1984 (pp. 50-57).

According to TIME, nearly 17,000,000 American homes—20 percent of all homes with television sets—now have at least one video cassette recorder. TIME, *supra,* at 45.

> "More than 14,000 pre-recorded [video] cassette [titles] are currently on the market . . . (an estimated 7,000 of them X-rated) . . . ." *Id.*
>
> "An estimated 20,000,000 pre-recorded cassettes will be sold in 1984, better than double the number of a year ago." *Id.*
>
> "[A]n estimated 70 percent to 80 percent of [video cassette owners] buy or rent pre-recorded cassettes at least occasionally." *Id.* at 47.
>
> "Consumers will spend about $1.8 billion dollars to rent cassettes this year and about $500 million dollars to buy them . . . . They rent . . . at prices that average around $5.00 a night and are as low as $1.00 in some cities." FORTUNE, *supra,* at 160.
>
> "Hard-core pornography accounts for a hefty share of the cassette business. X-rated movies were among the first to be released for home video and once made up about half of all sales and rentals. That share has dropped to around 15 percent by most industry estimates . . . . [M]any VCR owners . . . will sneak-a-peak at X-rated tapes in . . . their own homes." TIME, *supra,* at 47.
>
> "Tapes like these are lining the shelves of more than 12,000 video specialty stores around the country. Their business is skyrocketing." *Id.*

The market is growing explosively. NEWSWEEK estimates that the total annual revenue generated from video rentals and sale could reach $5 billion dollars in 1988, with "adult" materials accounting for 8 percent of that total. NEWSWEEK, *supra,* at 52.

Certain conclusions may be fairly inferred from the foregoing data. If $1.8 billion dollars was spent on video rentals in 1984 (at an average of $5.00 a tape), of which 15 percent was on adult materials, there were 54,000,000 rentals of adult video tapes in 1984. [In light of the fact that there are many stores where tapes rent for substantially less than $5.00 per tape, it is

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would necessarily understand that it was to make findings of shamefulness or morbidity.

Furthermore, even if there may still be some persons who find *any* arousal of lust or lasciviousness to be, *ipso facto*, shameful or morbid, the existence in common usage of another meaning of those words which is "value-neutral" precludes the certainty that these terms, otherwise unqualified, can constitutionally instruct a jury on the meaning of "prurient interest." As this Court noted in *Stromberg v. California*, 283 U.S. 359 (1931), a conviction cannot be maintained under a statute facially subject to possible unconstitutional application by a jury.

For all the foregoing reasons, the Statute's definition of "prurient interest" cannot be reconciled with this Court's precedent nor with the bulwarks around free expression which the First Amendment was intended to provide.

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likely that the figure of 54,000,000 rentals is substantially *less* than the actual number of adult video cassette rentals in 1984.] Although it is difficult to estimate with any precision the number of people likely to have viewed these 54,000,000 or more rental tapes, any such calculation should take into account the likelihood that most of these tapes were viewed by more than one person. Of course the possibility of multiple rentals by certain consumers should also be considered.

Additionally, if one were to add the absent figures for consumption of sexually oriented materials in other media—e.g. magazines, books, theatrically exhibited motion pictures, 8 millimeter films and pay television—the numbers of units and consumers must be significantly greater than those suggested by the previous calculations.

Finally, the present and anticipated future decline of the adult share of video cassette sales and rentals is indicative of nothing more than the recent entry of non-adult producers and distributors into the previously adult dominated video cassette market. The absolute numbers of adult video tape sales and rentals continue to increase enormously.

II

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT PLAINTIFFS HAD STANDING TO CHALLENGE THE OVERBREADTH OF THE STATUTORY DEFINITION OF OBSCENITY.

A. Where, As Here, Plaintiffs Assert That The Overbreadth Of A Statute Chills The Exercise Of Their Own First Amendment Rights (As Opposed To The Rights Of Third Parties Not Before The Court), Traditional Notions Of "Standing" Entitle Plaintiffs To Present Such Claims.

Appellants have injected needless confusion into this appeal by their numerous references to cases discussing standing to raise the rights of third parties not before the Court.[15] Appellees' challenge, however, has never been based upon a reliance on the rights of third parties not before the Court. [Significantly, appellants, notwithstanding their discussion of third party standing, have never alleged that appellees have actually invoked such standing.]

Rather, appellees' First Amendment claims are based on traditional notions of standing entitling a party to challenge elements of a law which impermissibly chill and deter *his own* rights of protected expression. Appellees have alleged that they are engaged in the dissemination of sexually oriented films, books and magazines[16] believed by

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[15] Although never asserting that appellees relied on third party standing, the Eikenberry brief makes 8 different references to the doctrine that, generally, plaintiffs may not assert the right of third parties nor may they complain of the possible invalidity of a statute in hypothetical fact situations absent a showing of "substantial overbreadth" as articulated in *Broadrick v. Oklahoma, supra*. *See* pps. 20-25 of the Eikenberry brief.

[16] Indeed, appellees involved in these seven consolidated cases are representative of almost every type of business that

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(Footnote continued from previous page)

might ever be prosecuted under this statute. For example, appellee J. R. Distributors, Inc. owns and operates retail bookstores throughout the state of Washington. These stores sell books, magazines, newspapers, films and videotapes depicting sexual activities and themes to the adult public. [Jt.App. at 30.]

Appellee Spokane Arcades, Inc. operates three bookstores offering books and magazines for sale to the public and, additionally, operates a motion picture arcade on those premises where films can be viewed within coin-operated booths. [Jt.App. at 14-15.]

Appellee Playtime Theatres, Inc. operates an "adult motion picture theater in Spokane, Washington, which is regularly frequented by both married and unmarried couples, as well as single individuals. [See Consolidated Excerpt of Record filed in the Court of Appeals at p. 218.]

Appellee Burns is the executor of an estate which owns and operates a "general audience" motion picture theatre in Oroville, Washington. Some of the motion pictures exhibited there are rated "R" and/or "X" by the MPAA. [See Consolidated Excerpt of Record at 276.]

Appellee Motion Picture Exhibitors of Washington, Alaska and Northern Idaho represents the owners of approximately 95% of the commercial motion picture screens in the state of Washington. At least one member regularly shows a mixture of general release and sexually explicit "x-rated" films. [See Affidavit of M. W. Saffle at p. 2, filed in the District Court for the Eastern District of Washington in no. C-82-283-RJM. This affidavit was designated for the record on appeal although it was not included in the Consolidated Excerpt of Record filed in the Court of Appeals.]

Appellee Madrona Publishers, Inc. is a Washington corporation which, on the basis of annual sales volume, is the largest general publication book manufacturing company in Washington. [See Affidavit of Dan Levant also filed in the District Court in no. C-82-283-RJM. This document was designated for the record on appeal but was not otherwise included in the Consolidated Excerpt of Record.]

Appellee A.C.L.U. of Washington represents approximately 5,000 Washington citizens who allege that this statute, if upheld, would restrict their ability to purchase and/or enjoy non-obscene films and or publications which would otherwise be available to them. [See affidavit of Kathleen Taylor filed in the District Court in no. C-82-283-RJM. This document was also designated for inclusion in the record on appeal but was not included in the Consolidated Excerpt of Record.]

appellees to be constitutionally protected. They have also alleged that, due to their dissemination of such materials, they face a substantial threat of prosecution under the Statute. Furthermore, they have alleged that the definition of obscenity is unconstitutionally overbroad and, as a result, has a chilling and deterrent effect upon their exercise of their own First Amendment rights of Free Speech. Accordingly, plaintiffs have no need to rely upon the "third party" overbreadth standing discussed in *Broadrick* but instead have grounded their challenge on the traditional notion that a party has standing to assert that a statute is unconstitutional as applied to his or her own conduct. *See,* e.g., footnote 16 and the accompanying text appearing in *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 217 (1975) [theater manager affirmatively challenged overbroad ordinance regulating drive-in theatres—this Court held that "the deterrent effect of this ordinance is both real and substantial" and that theater manager was asserting "statute's deterrent effect . . . upon him personally; he is not seeking to raise the hypothetical rights of others." *Id.*]

In its most recent discussion of the distinction between this "traditional" type of standing and *Broadrick's* "third party overbreadth" standing, this Court stated:

> "The seminal cases in which the Court held state legislation unconstitutional 'on its face' did not involve any departure from the general rule that a litigant only has standing to vindicate his own constitutional rights. In *Stromberg v. California,* 238 U.S. 359 (1931) and *Lovell v. Griffin,* 303 U.S. 444 (1938), the statutes were unconstitutional as applied to the defendants' conduct, but they were also unconstitutional on their face because it was apparent that any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas. *In cases*

> *of this character a holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner.* Such holdings invalidated entire statutes, but did not create any exception from the general rule that constitutional adjudication requires a review of the application of a statute to the conduct of a party before the Court." (Emphasis added), *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent,* — U.S. —, —, 104 S.Ct. 2118, 2124-2125 (1984).

[*See also* the recent discussion of the inapplicability of the "substantial overbreadth" doctrine to cases like the instant one in *Secretary of State of Md. v. Munson Co.,* — U.S. —, —, 104 S.Ct. 2839, 2851-53 (1984).]

It is respectfully submitted that appellees' standing is the type of "traditional" standing discussed in *Taxpayers for Vincent, supra,* and, as such, is unaffected by the "third party standing" doctrine discussed by appellants.

B. Where, As Here, The Defect In The Statutory Definition Of Obscenity Will Exist In Every Case, Facial Invalidation Is The Appropriate Remedy.

If the Statute's definition of "prurient interest" is unconstitutional, then *every* use of the Statute will employ a definition which affords less protection than that which the First Amendment mandates. In virtually *every* obscenity determination, material which may contain individual offensive and sexually stimulating scenes may nonetheless be found, when *taken as a whole,* not to be considered unhealthy, shameful or morbid when measured by contemporary community standards. Since the Statute deprives individuals of this "constitutional benefit" in *every* circumstance and case arising thereunder, it necessarily follows that the Statute's overbreadth is "substantial" . . . . judged in relation to the statute's plainly legitimate sweep." [*Broadrick, supra,* 413 U.S. at 615.]

This is because the Statute has *no* "legitimate" applications *whatsoever!* Regarding such a circumstance, this Court recently stated:

> "Where, as here, a statute imposes a direct restriction on protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the State's objectives are too imprecise *so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack.*" (Emphasis added.) *Secretary of State of Maryland v. Joseph H. Munson Company, Inc., supra,* 104 S.Ct. at 2853.

The Statute's overbreadth could not possibly be *more* substantial. Not only will the overly broad definition of "prurient interest" apply in every trial, but the definition will also likely result in self censorship generally. This is a particularly likely result, where, as here, the potential penalties for the sale or exhibition of "obscene materials" include *unlimited* civil monetary penalties and *severe* criminal felony penalties including a potential 5-year prison sentence (per each count) and a statutorily required *mandatory minimum* fine of $5,000.00 *per count,* as well as a potential maximum fine of $50,000.00 *per count!*[17] Where such *severe*[18] penalties are possible, a statute must

---

[17] If, for example, an employee working at one of the bookstores owned by plaintiff J.R. Distributors, Inc., sold 30 copies of a particular month's issue of PLAYBOY Magazine subsequently found obscene at trial, he could be subjected to successive criminal fines of up to $50,000.00 for *each sale* of the 30 copies proven at trial!

[18] The Statute's penalties appear to be by far the most economically punitive in the history of American obscenity legislation.

strictly comply with First Amendment standards to avoid the almost certain result of substantial self censorship.[19] As this Court noted in *New York v. Ferber*, — U.S. —, —, 102 S.Ct. 3348, 3363 (1982): "We recognize, however, that *the penalty to be imposed is relevant in determining whether demonstrable overbreadth is substantial.*" (Emphasis added.)

In addition to its substantial self censoring impact on disseminators of sexually oriented material, the Statute's overbreadth will also affect decisions of police and prosecutors as to what material should be seized and/or prosecuted. In sum, the overbreadth will affect publishers, producers, distributors, exhibitors, police, prosecutors, judges and juries in *every* use of the Statute.

For all the reasons above, the Court of Appeals correctly concluded that plaintiffs had proper standing to present their First Amendment challenge to the statutory definition of "prurient interest" and that facial invalidation was appropriate because, in *every* case, defendants would be prosecuted pursuant to a definition which gave less protection than that which is guaranteed by the First Amendment.

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[19] In cases of this type, the chilling effect is *presumed*. See *Taxpayers For Vincent, supra,* where the Court stated:

> "[W]here the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack." 104 S.Ct. at 2126, n.19.

Accord, Joseph Munson Co., supra, 104 S.Ct. at 2853. *See also* the discussion of footnote 16 and the accompanying text from *Erznoznik v. City of Jacksonville, supra* [422 U.S. 205, 217 (1975)], appearing herein at p. 39, *supra*.

III

THE COURT OF APPEALS PROPERLY DECLINED TO SEVER THE UNCONSTITUTIONAL DEFINITION FROM THE STATUTE.

Appellants have unequivocally asserted that the legislative intent was to define "prurient interest" exclusively in terms of mere sexual stimulation or arousal. [See discussion in "Position of Parties," *supra* at pp. 11-12.] Having failed to do so in the Court of Appeals, they argue herein that if their definition of "prurient" is unconstitutional, it should be severed, leaving intact the undefined statutory term of "prurient interest." However, if a federal court were to strike the impermissible portion of the statute, its judgment would necessarily be a holding that the term "prurient interest," standing alone, must be defined as something *other* than mere sexual arousal or stimulation.

Since the Washington Legislature *intended* that the term "prurient interest" convey the concept of stimulation of "sexual longing or desire, without regard to whether the stimulated desire is wholesome or not" [Brockett's brief at 23—additionally see Brockett's brief at 11], severance of the impermissible statutory definition of "prurient interest" [contained in § 1(8) of H.B. 626] would give the Statute a meaning of "prurient interest" significantly different from that intended by the state Legislature.

Since federal courts "lack jurisdiction authoritatively to construe state legislation" [*United States v. 37 Photographs, supra,* 402 U.S. at 369; *accord, Gooding v. Wilson,* 405 U.S. 518, 520 (1972)], it would have been improper for the Court of Appeals to have severed the definition in

§ 1(8) thereby giving the term "prurient interest" a significantly different meaning from that intended by the legislature.

Finally, given that appellants did not argue "severability" in the Court of Appeals, they are precluded from raising it in this Court on appeal.

IV

THE COURT OF APPEALS PROPERLY HELD PULLMAN ABSTENTION INAPPROPRIATE.

Contrary to appellants' arguments, there is *not* an unsettled issue of state law counseling abstention under the rationale of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Appellants have informed this Court that their legislature intended "prurient interest" to mean "that which incites sexual desire or longing" without any additonal requirement of unwholesomeness, etc. [See, e.g., Brockett's brief at 11.] Appellees agree that this is *exactly* what the legislature meant and what the terms "lasciviousness" and "lust" mean as used in § 1(8) of the Statute. Since there is no dispute as to the meaning of the state law, *Pullman* abstention is unwarranted.

Even if appellants have misread the legislature's meaning, appellants *will enforce the statute* consistent with their interpretation that the terms "lasciviousness" and "lust" describe the arousal of mere sexual desire absent any requirement that the material be deemed shameful, morbid, unhealthy or unwholesome. Accordingly, appellees are immediately threatened with enforcement of the Statute as it has been interpreted by appellants, and a federal question has been squarely presented that is ripe for decision.

However, even if this Court should conclude that the statutory meaning is unclear, *Pullman* abstention would *still* be inappropriate because of the need for urgent relief to protect the exercise of First Amendment rights which would be deterred or chilled during the long period necessary to obtain a state court construction and, thereafter, if necessary, for appellees to return to federal court. As noted previously, the Statute's unprecedentedly severe civil and criminal sanctions [see pp. 41-42, *supra*], coupled with the overbroad definition of "prurient interest," would have had an *extremely* substantial deterrent impact upon protected speech had enforcement of the Statute not been enjoined below.

Furthermore, if appellants believed that the legislature intended "prurient interest" to mean a "shameful or morbid" interest, they could long ago have sought such a construction by the state courts in a civil declaratory judgment action. Appellants have not been nor are they now prevented by the federal injunction from seeking such a state court authoritative construction.

Secondly, appellants could also have sought a legislative redefining of "prurient interest." Their failure to pursue either of these two options underscores the absence of statutory ambiguity. The Statute means exactly what appellants say it means, i.e. mere "sexual arousal" and *not* a shameful, morbid, unhealthy or unwholesome interest in sex.

Finally, this Court's opinion in *Dombrowski v. Pfister*, 380 U.S. 479, 491 (1965) makes clear that even now, after the issuance of a permanent federal injunction, appellants may still seek an authoritative saving construction of the Statute in a state civil action. Thereafter, as has been

done elsewhere,[20] they may return to the federal court for modification of the permanent injunction.

———o———

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

DATED: January, 1985

Respectfully submitted,

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20 *See, e.g., Yuclan Enterprises, Inc. v. Nakagawa*, 583 F. Supp. 1574 (D.Hawaii 1984) [where, under the authority of F.R.Civ.P. 60(b), the federal court rescinded its prior final judgment which had enjoined enforcement of a Hawaii obscenity statute, following the subsequent ruling of the Hawaii Supreme Court rendering a saving construction of the statute].

Similarly, in *Sovereign News Co. v. Corrigan*, 610 F.2d 428 (6th Cir. 1979), *cert. den.* 447 U.S. 923 (1980), a District Court's order preliminarily enjoining enforcement of an Ohio anti-obscenity statute was remanded by the Sixth Circuit Court of Appeals for further consideration after a state court, in a ruling subsequent to the District Court's injunctive order, had rendered a potentially saving construction of the statute.

APPENDIX A

Wash. Sess. Laws, ch. 184, 47th
Legis., HB 626

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Section 1. The definitions set forth in this section shall apply throughout this chapter.

(1) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual or violent conduct which appears in the lewd matter, or knowledge of the acts of lewdness or prostitution which occur on the premises.

(2) "Lewd matter" is synonymous with "obscene matter" and means any matter:

(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which explicitly depicts or describes patently offensive representations or descriptions of:

(i) Ultimate sexuals acts, normal or perverted, actual or simulated; or

(ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or

(iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

(c) Which, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value.

(3) "Lewdness" shall have and include all those meanings which are assigned to it under the common law.

(4) "Matter" shall mean a motion picture film or a publication or both.

(5) "Motion picture film" shall include any:

(a) Film or plate negative;

(b) Film or plate positive;

(c) Film designed to be projected on a screen for exhibition;

(d) Film, glass slides, or transparencies, either in negative or positive form, designed for exhibition by projection on a screen;

(e) Video tape or any other medium used to electronically reproduce images on a screen.

(6) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(7) "Place" includes, but is not limited to, any building, structure, or places, or any separate part or portion thereof, whether permanent or not, or the ground itself.

(8) "Prurient" means that which incites lasciviousness or lust.

(9) "Publication" shall include any book, magazine, article, pamphlet, writing, printing, illustration, picture, sound recording, or coin-operated machine.

(10) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer of possession of, lewd matter.

NEW SECTION. Section 2. The following are declared to be moral nuisances:

(1) Any and every place in the state where lewd films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition;

(2) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a moral nuisance under this section;

(3) Any and every place of business in the state in which lewd publications constitute a principal part of the stock in trade;

(4) Every place which, as a regular course of business, is used for the purpose of lewdness or prostitution, and every such place in or upon which acts of lewdness or prostitution are conducted, permitted, carried on, continued, or exist.

NEW SECTION. Sec. 3. Any of the following parties may bring a civil action in the superior court of any county where a moral nuisance is alleged to have been maintained:

(1) The prosecuting attorney for the county where the alleged moral nuisance is located;

(2) The city attorney for the city where the alleged moral nuisance is located; or

(3) The attorney general.

The rules of evidence, burden of proof, and all other rules of court shall be the court rules generally applicable to civil cases in this state: PROVIDED, That the standard of proof on the issue of obscenity shall be clear, cogent, and convincing evidence.

NEW SECTION. Sec. 4. (1) No person shall with knowledge maintain a moral nuisance.

(2) Upon a determination that a defendant has with knowledge maintained a moral nuisance, the court shall impose a civil penalty and judgment of an amount as the court may determine to be appropriate. In imposing the civil penalty, the court shall consider the wilfulness of the defendant's conduct and the profits made by the defendant attributable to the moral nuisance.

NEW SECTION. Sec. 5. All civil penalties assessed under section 4 of this act shall be paid into the general treasury of the governmental unit commencing the civil action.

NEW SECTION. Sec. 6. Nothing in this chapter applies to the circulation of any material by any recognized historical society or museum, any library of any college or university, or to any archive or library under the supervision and control of the state, county, municipality, or other political subdivision.

NEW SECTION. Sec. 7. Sections 1 through 6 of this act shall constitute a new chapter in Title 7 RCW.

NEW SECTION. Sec. 8. There is added to chapter 9.68 RCW a new section to read as follows:

A person who, for profit-making purposes and with knowledge, sells, exhibits, displays, or produces any lewd matter as defined in section 1 of this act is guilty of promoting pornography. Promoting pornography is a class C felony and shall bear the punishment prescribed for that class of felony, except that upon conviction of promoting pornography the court shall impose a fine of not less than five thousand dollars per count nor more than fifty thousand dollars per count. In imposing the criminal penalty, the court shall consider the wilfulness of the defendant's conduct and the profits made by the defendant attributable to the felony. All fines assessed under this chapter shall be paid into the general treasury of the state.

NEW SECTION. Sec. 9. If any provision of this act or its applicatoin to any person or circumstance is held invalid, the remainder of the act or the applicatoin of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 10. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

(15) (10)

No. 84-28 AND 84-143
Consolidated

Supreme Court, U.S.
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IN THE

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OF THE

UNITED STATES

OCTOBER TERM, 1984

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DONALD C. BROCKETT,

Appellant,

v.

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Appellees.

No. 84-143

KENNETH O. EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Appellants,

v.

J-R DISTRIBUTORS, INC., et al.,

Appellees.

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APPELLANTS' JOINT REPLY BRIEF

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APPELLANTS' JOINT REPLY BRIEF

I.

SUMMARY OF ARGUMENT

Before replying directly to the arguments of the appellees, it may be helpful to try to delineate the areas of agreement and disagreement between the parties, and to show thereby the real core of this controversy.

A. Areas of Agreement and Disagreement

1. The parties agree that under *Roth* and *Miller*, obscenity is not constitutionally protected, states have a legitimate interest in the prohibition of obscene materials, and it is a proper state activity to prohibit the dissemination or exhibition of obscene materials.

2. While less clear, there appears to be no great disagreement as to what elements constitute obscenity under *Roth* and *Miller*—with one possible exception. To be more specific, there is no dispute at all over the meaning and application of the second and third prongs of the *Miller* three-prong test. And with respect to the first prong, there seems to be agreement that material encompassed by that prong—the "prurient interest" prong—must appeal to something other than the ordinary, normal, or "healthy" interest in sex. And that "something other" is determined by contemporary community standards. In short, there is agreement that the kinds of materials which so concerned the court below—automobile and perfume ads, for example—are not covered by the first prong of the *Miller* test.

3. There also appears to be agreement that those materials discussed by the Court of Appeals are not within the scope of the Washington statute. As pointed out in appellants' opening brief, even if they are within the scope of the first prong of the statutory test (though we contend they are not), they certainly are not within the second. The appellees seem to agree, for they do not now talk at all about materials of the sort discussed by the court below but, instead, conjure up other sorts of materials, which we shall discuss subsequently. The point here is simply that if a loose reading of the Washington statute does conceivably reach some protected speech there is much less of it than the court below speculated. We, of course, contend that the statute does not reach protected speech at all.

4. As noted by the appellees in their brief, the majority of state obscenity statutes include the term "prurient interest", as does the Washington statute, but, unlike the Washington statute, leave that term undefined. (Appellees' brief, p. 27). There seems to be no dispute that the

inclusion of that term, while leaving it statutorily undefined, is constitutionally permissible. Washington's statute is here under attack simply and solely because it does not leave "prurient" undefined but, instead, does define it, by using the phrase: "that which incites lasciviousness or lust".

B. The Core of the Controversy

We here reach the real area of dispute. Appellants acknowledge that there are some meanings of the term "lust" which if mechanically applied as an isolated term could render the statute capable of unconstitutional applications. These meanings are discussed in the opinion of the Court of Appeals. And appellees assert that we assign to "lust" those very meanings — an assertion which we emphatically deny. Appellees, however, are forced to concede that other meanings, including dictionary definitions, of the term "lust" are available which would not render the statute capable of unconstitutional applications.

Our purpose here is to point out the central question in this case: When there are meanings which would render a statute constitutional and others to the contrary, which meaning should be chosen? And which courts, state or federal, should do the choosing? Or to put it another way, should the federal court leave it to the state courts to do the choosing? And if the state courts are to do it, should the federal courts let the statute operate and have effect in the meantime?

Though we shall discuss the various available meanings of the term "lust" subsequently, we would here mention one point — which is a critical one. As we have already noted, many states' statutes leave the term "prurient" undefined. That term is used throughout the case law — as in *Roth* and *Miller* — and one must look to that case law for its meaning.

The term lust (or rather, "lustful thoughts") and the term "lascivious" are also used in the case law, i.e., in *Roth*. And we are simply suggesting that one must look to the same case law for the meaning of those terms as well.

Those terms should be treated just like the term "prurient" as used in the many state statutes which leave it undefined. Their meaning comes from the case law.

Further, though various meanings of the word "lust" are available which do not do violence to the word itself — in the sense that calling something "white" when it is really green or orange does violence to the term "white" — some of those meanings will do violence to the *statute*, by assigning a meaning which makes no sense in the context of that statute. And the meanings which the appellees would assign to the term do just that.

One last preliminary consideration, if this Court decides in appellants favor, there is the risk that the Supreme Court of the State of Washington would not do what we say it would do, and would assign to "lust" the meaning which appellees and the Ninth Circuit have assigned to it. We believe we can show this Court that for the state court to do so would be absurd, contrary to its past precedent, and therefore highly unlikely. See *State v. J-R Distributors, Inc.*, 82 Wn.2d 584, 512 P.2d 1049 (1973).

Against that risk should be weighed the result of deciding in favor of the appellees. Right now, the Washington statute is completely inoperative. The appellees can thus continue to disseminate to the public, material such as the picture magazine entitled "Tit and Body Torture". Indeed, we would suggest it is a near certainty that they will do so. Such a result should not be allowed. Appellees should be made to do that which they say they are doing — challenge the statute "as applied." (Appellees' brief, p. 39).

II.

ARGUMENT

A. APPELLEES ANTICIPATORY CHALLENGE TO THE WASHINGTON STATE OBSCENITY STATUTE SHOULD BE DENIED. THE CHALLENGE RESTS ON THE CONSTRUCTION OF ONE WORD IN A COMPLEX STATUTORY MATRIX AND "OUR FEDERALISM", WARRANTS AN OPPORTUNITY FOR CONSTRUCTION BY THE *STATE COURT*.

Appellees subject the Washington statute to a microscopic inspection, claiming the validity of an entire statute rests on the definition of prurient. One must remember, however, the term prurient is but one aspect of the "prurient interest" element, which, in turn, is only one of four elements comprising the first of a conjunctive three-pronged test of obscenity.

The test for obscenity is a holistic one. *All* three prongs of the *Miller* tripartite test must be met. Thus, while material may be impaled by the first prong of the obscenity test as set forth in *Roth*, it may only be labeled as obscene following application of the other two prongs. Likewise, all elements of the first prong itself must be met: whether the (1) average person, (2) applying contemporary community standards, would find that the work, (3) taken as a whole, (4) appeals to the prurient interest. *Miller v. California*, 413 U.S. 13, 24 (1973). Thus, even the first prong does not pierce the target based on the "prurient interest" element alone.[1]

Moreover, if there is *really* a question as to the meaning of "prurient" in the Washington statute it is a matter for the state courts.[2] And this Court is advised of the construction given by the Washington Supreme Court in the past when it construed a challenged obscenity statute consistent with *Roth-Miller*. See *State v. J-R Distributors, Inc.*, 82 Wn.2d 584, 601-602, 512 P.2d 1049, 1060 (1973).[3] In turn, this Court "invariably accepts the gloss the highest state court has placed on a state statute." Monaghan, *Overbreadth*, 1981 S.Ct.Rev. 21; citing *Ward v. Illinois*, 431 U.S. 767, 773-76 (1977).

---

[1]The real emphasis of the first prong has, by case law, been the "average person" (*Mishkin v. New York*, 383 U.S. 502 (1966); "contemporary community standards" (*Miller v. California*, 413 U.S. 13 (1973); and "taken as a whole" (*Roth v. United States*, 354 U.S. 476 (1957).

[2]Certification to the Washington State Court with regard to a question of state law is an available procedure. See Rev. Code Wash., ch. 2.60.

[3]Appellees argue that appellants bind the state to any statutory constructions offered by way of argument. On the contrary, the state courts, and particularly the State Supreme Court, binds the appellants.

Finally, a jury instruction under the Washington statute could readily be written within *Roth-Miller*. Thus the statute should be held constitutional and appellees microscopic inspection should be denied. Appellees' asserted "concern" for the understanding of a juror is without merit. *Miller* makes clear that the judicial meaning of obscenity can readily be translated for common understanding through jury instructions. Such instructions need not be made part of the statute for it to be deemed constitutional. On its face, the statute is constitutional.

B. THE WASHINGTON STATUTE DEFINES "PRURIENT" WITHIN THE PARAMETERS OF THE JUDICIAL MEANING ASCRIBED TO THE TERM BY THIS COURT. THIS COURT DID NOT DEMAND A SINGLE, FIXED DEFINITION IN *ROTH-MILLER*.

There is in reality, no question as to the definition of prurient. It is, in the Washington statute, a defined term. Rather, it is the term "lust" which is not defined by the statute. And that, according to the appellees, is the fatal flaw. In so arguing appellees and the Court of Appeals assign to *that* term a single, *fixed* definition denoting normal, healthy sex. Conversely, what meaning do appellants assign to the word "lust"? That and only that meaning which this Court assigns to it in the context of a definition of "prurient" clearly intended to track the *Roth-Miller* tests of constitutionally unprotected obscenity *and no more*.

Before addressing this point directly, we should state once again our own basic contention. In adopting the Washington statute, the legislature intended to reach as far as was constitutionally permissible under the decisions of this Court, but not one step beyond. Appellees contend that the legislature ventured into the arena of constitutionally protected speech by using the word "lust".

To answer that contention, one must take a brief look at this Court's decisions involving obscenity and the use in those decisions of the terms "lust" or "lustful thoughts". The judicial meaning of those terms, to be gleaned from

those decisions, implies an overall theme conveyed by another term — prurient. While a number of adjectives (such as shameful, morbid, unhealthy, lustful) may be used in describing that word, all are constitutionally acceptable if they convey that basic theme of pruriency. Thus, by defining prurient one also by necessity gives meaning to those adjectives. However, to be constitutionally acceptable, one must stay within the parameters first established in *Roth*, 354 U.S. 476, 487, n. 20 (1957).

Indeed, the *Roth* judicial meaning adopted in *Miller* has never been overruled and thus spells out the current state of the law upon which state legislatures may rely and upon which Washington did rely. Thus the question here presented is a simple one, what was the meaning ascribed to prurient by the *Roth* Court?

That question is addressed by footnote 20 in *Roth*. By reading that footnote as a whole and recognizing that it provides the parameters within which one can understand prurient, one can reconcile the cases relied upon by the Court, the jury instructions affirming the challenged convictions, and the concurring and dissenting opinions in *Roth*. For ease of reference, we repeat the footnote here.

> "Obscene material is material which deals with sex in a manner appealing to prurient interest.[20]
>
> [20]I.e., material having a tendency to excite lustful thoughts. Webster's New International Dictionary (Unabridged, 2d ed, 1949) defines *prurient*, in pertinent part, as follows:
>
> "* * * Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd. * * *"
>
> *Pruriency* is defined, in pertinent part, as follows:
>
> * * * Quality of being prurient; lascivious desire or thought
>
> See also, *Mutual Film Corp. v. Industrial Comm.*, 236 US 203, 242, where this Court said as to motion pictures: "* * * They take their

> attraction from the general interest, eager and wholesome it may be, in their subjects, but a *prurient interest may be excited and appealed to.* * * *" (Emphasis added)
>
> We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A. L. I., Model Penal Code, § 207.10(2) (Tent Draft No. 6, 1957), *viz:*
>
> "* * * A thing is obscene if, considered as a whole its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. * * *" *Roth,* 354 U.S. at 487, n. 20. (Emphasis in original)

The Court specifically referred to the term "prurient" and defined it in the footnote by stating: "* * * *in other words* 'material having a tendency to excite lustful thoughts' ". *Id.* It is thus clear the *Roth* Court sanctioned a use of the term "lust" in defining "prurient". The Court also cited to prior case law which had described the test for obscenity by using the terms "lust" or "lustful". *Id.* at 489, n. 26.[4] In *Roth,* the convictions of both defendants were affirmed because the trial courts, in the words of this Court, "* * * followed the proper standard. Both courts

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[4] *Parmelee v. United States,* 72 App.D.C. 203, 113 F.2d 729, 736 (D.C. Cir. 1940) (works are protected if "the erotic matter is not introduced to promote lust"); *United States v. One Book Called "Ulysses",* 5 F.Supp. 182, 184 (S.D.N.Y. 1933) ("The meaning of the word 'obscene' as legally defined by the co[illegible]nding to stir the sex impulses or to lead to sexually impure [illegible]houghts."); *State v. Becker,* 364 Mo. 1079, 1085, 272 S.W.2d [illegible] (1954) ("After applying the required tests all the mem[illegible] Court have concluded that the contents of these publicatio[illegible] to incite lascivious thoughts, arouse lustful desire, * * * ."); *Adams Theatre Co. v. Keenan,* 12 N.J. 267, 272, 96 A.2d 519, 521 (1953) ("The question is whether the dominant note of the presentation is erotic allurement 'tending to excite lustful and lecherous desire; * * * .' "); *Commonwealth v. Isenstadt,* 318 Mass. 543, 550, 62 N.E.2d 840, 844 (1945) ("A book is 'obscene' * * * if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire.")

used the proper definition of obscenity." *Roth*, 354 U.S. at 489. That definition, which was included in the jury instructions in both the *Roth* and companion *Alberts* case, used the term "lustful". *Id.* at 486.[5] The concurring opinion of Justice Harlan in *Roth* in turn meets the Court of Appeals and appellees' argument in the instant case head on. Justice Harlan logically concluded that if the "shameful or morbid" definition of the Model Penal Code was the only acceptable one the convictions of the defendants would, by necessity have been reversed. *Roth*, 354 U.S. at 500. The dissenting opinion in *Roth* also took special note of the language of the challenged jury instructions and acknowledged that the majority had accepted those instructions. *Roth*, 354 U.S. at 508-509. (Douglas, J., dissenting with Black, J.).[6] Neither the Court of Appeals nor the appellees refute or even acknowledge the language of the jury instructions questioned and affirmed by this Court in *Roth*.

It is thus clear the footnote (as above quoted) articulated a constitutionally acceptable meaning of prurient which includes the term lust. But *Roth* went further, allowing other alternative ways to define prurient, including itching, longing, lascivious, lewd, shameful and morbid. *Roth*, 354 U.S. at 487, n. 20. The Court again cited to previous case law using such words. In *Alberts*, the trial court

---

[5]The *Roth* instruction was: "The words 'obscene, lewd and lascivious' as used in the law, signified that form of immorality that has relation to sexual impurity and has a tendency to excite lustful *thoughts*." (Emphasis in original)

The *Alberts* instruction was: "whether the material has 'a substantial tendency to deprave or corrupt its readers by inciting lascivious *thoughts* or arousing lustful desires." (Emphasis in original) *Roth*, 354 U.S. at 486.

[6]Appellees simply misread a footnote in *Miller* quoting a concurring opinion of Chief Justice Warren in *Roth*. *Miller*, 413 U.S. at 35, n. 15. The quoted text refers to the importance of the defendant's commercial or business use of the questioned materials. *Roth*, 354 U.S. at 496 (Warren, J., concurring). In *Miller*, the Court refers to the concurring opinion in distinguishing protected speech from the dissemination of pornography for commercial gain. *Miller*, 413 U.S. at 35. In fact, the concurring opinion on the subject of defining obscenity specifically referred to "lustful desires". *Roth*, 354 U.S. at 494.

instruction included the term "lascivious", which is also in the Washington statute. *Roth*, 354 U.S. at 486. Justice Harlan also addressed this point directly after he rejected the suggestion that shameful or morbid was *the only* definition. Obviously referring to footnote 20, he concluded, "The Court merely assimilates the various tests into one indiscriminate potpourri." *Roth*, 354 U.S. at 500. This "potpourri" nonetheless conveys the parameters within which state legislatures must stay, and Washington did stay, in regulating obscenity.

What we are saying is that "lust" or "lustful thoughts", as used in those cases have a certain meaning which stays within the parameters established by this Court. Therefore, the word "lust" as used in the Washington statute is to be given that same meaning so as to stay within the same parameters.

Thus, in addressing the question of what is meant by lust, within the judicial meaning of prurient, it is clear what that term does *not* mean. As thus used, it does not denote a healthy, wholesome interest in sex. It does not refer to mere sexual stimulation.[7] Rather, in context, it generally encompasses a lewd, lascivious, unhealthy, unwholesome, shameful, or morbid interest in sex. All such adjectives are intended to convey the same basic theme, and that theme is *not* healthy and wholesome. Interest-

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[7]Appellees misconstrue appellants' argument on this point. The *purpose* as stated by appellants, behind the prurient appeal requirement, is to distinguish protected speech (intellectually stimulating) from unprotected speech (sexually stimulating, exciting, erotically arousing). *Miller*, 413 U.S. at 18, n. 2; *Ginzburg v. United States*, 383 U.S. 463, 470 (1966). "The concept fundamental to the *Miller* test is that material appealing to the prurient interest *is* sex, and not merely describing or advocating sex. Material that appeals to the prurient interest is material that turns you on. Period." F. Schauer, *Speech and Obscenity*, 67 Georgetown L.Rev. 899, 928 (1979). (Emphasis in original). The appellees seize upon this point and argue that appellants have given to "lust" a "fixed meaning" which necessarily includes a normal, "healthy" or "wholesome" reaction to any sort of visual sexual stimulus. Indeed, the appellees' major argument is based entirely upon this "fixed meaning". See Appellees' Brief, p. 11-14, under the heading "The Position of the Parties". The appellees therein completely misstate appellants' position.

ingly, the Court of Appeals apparently accepted the term "lasciviousness" as connoting something other than healthy, wholesome. To argue that lust does not is simply inconsistent. One cannot logically believe that the Washington Legislature in using "lasciviousness" meant unhealthy, unwholesome while in using "lust" it meant the opposite. The words clearly and logically were meant to be consistent — with neither meaning healthy or wholesome.[8] Further, we note that appellees agree with one amicus that "prurient" means unhealthy or unwholesome. (Appellees' brief, p. 12) Why, then, do they contend that there is but one single, fixed constitutionally accepted definition of that term? Do shameful, morbid, unhealthy and unwholesome all mean the same thing — either by dictionary definition or contemporary usage? No. But they all do convey a theme and are within the parameters of *Roth*. So, too, do lust or lascivious. As a matter of fact, contrary to appellees' assertions, it is their single, fixed definition which invites constant litigation to ascertain "today's" meaning. On the other hand, a judicial meaning remains constant. Traditional guidelines provided by this Court would give way to contemporary slang or jargon under appellees argument.

One last comment regarding *Roth*, by the inclusion of footnote 20, the Court apparently thought that it would be helpful to give some sort of definition to the term "prurient", and that it would also be helpful to use the terms "lustful thoughts" and "lasciviousness" in that definition. The drafters of the Washington statute were obviously thinking along the same lines, for they used the same or similar words, as though lifted directly from that footnote. Thus, it would be absurd to suggest that those terms, as used in the footnote, connote something other than healthy or wholesome — which they clearly do — while the same or similar terms in the Washington statute do not.

Appellees' entire argument rests on the premise that

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[8]"(8) 'Prurient' means that which incites lasciviousness or lust." Wash. Sess. Laws 1982, ch. 184, 47th Legis., H.B. 626 § 1(8); JS G-2. It is clear from the definition that the word "incites" conveys an exacerbated, not healthy, interest in sex.

under the Washington statute the "contemporary community standards" element of the first prong is made meaningless. (Appellees brief, p. 7-8, 21-24). To the contrary, that "standard" supports the position of appellants. Prurient means that which this Court ascribed to it, not healthy or wholesome. That judicial meaning is carried out in the Washington statute. The "contemporary community standards" element continues to have the same import it did in *Roth-Miller*.

C. THIS COURT IS WITHOUT *ACTUAL* FACTS OR A *REALISTIC* HYPOTHETICAL SUPPORTING THE CONTENTION OF APPELLEES. THE EXAMPLES PROFFERED BY THE COURT OF APPEALS ARE WITHOUT MERIT WHILE THE ACTUAL MATERIAL IS THAT AT WHICH THE WASHINGTON STATUTE IS AIMED — HARD-CORE PORNOGRAPHY.

Unlike most overbreadth cases, this Court has here been deprived of *any* actual facts alleging an unconstitutional application of the challenged statute. See *Secretary of State of Md. v. Joseph H. Munson Co.*, ___ *U.S.* ___, *104 S.Ct. 2839 (1984); Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). Thus, the Court is left only with hypothetical situations. There are no facts to focus and give meaning to the issues presented. The problem with such judicial speculation is made vividly clear by the Court of Appeals' notion of a necessity, under the challenged statute, "to hale into court our leading couturiers, perfumers, and manufacturers of soft drinks, soap suds and automobiles * * *." *J-R Distributors, Inc.*, 725 F.2d 482, 492 (9th Cir. 1984); JS A-20, A-21. In so hypothesizing, the Court of Appeals failed to consider the judicial meaning of prurient and the conjunctive tripartite test for obscenity under the statute; namely, the required "patently offensive" representations or descriptions. Appellees have failed to recognize that the hypotheticals provided by the Court of Appeals fail not only under the second prong but the first as well, assuming the ads appeal only to a healthy, wholesome interest in sex.

It is interesting to note that appellees provided no evidence at trial and have *throughout* this litigation failed to provide even a hypothetical situation in which the statute, by its definition of prurient, would apply to constitutionally protected speech. On the other hand, the only material before the trial court and Court of Appeals provides a clear example of a constitutional application.[9] Obviously, appellees' attack on the facial validity of the Washington statute thus places this Court in the position of arbitrating hypothetical grievances without the benefit of statutory interpretation by the state court. To do so reduces this Courts' "* * * function to passing words in the context of imaginary events." *Lewis v. City of New Orleans*, 415 U.S. 130, 137 (1974) (Blackmun, J., dissenting).

It is presumed the Washington Legislature intended the challenged statute to be constitutional. This is obvious from the statute's adoption of the precise language of the *Miller* tripartite test. *Miller*, 413 U.S. at 24; Wash. Sess. Laws 1982 ch. 184, 47th Legis., H.B. 626; JS G-1. In defining "prurient", the legislature complied with *Roth* and *Miller*. Thus in this, a facial challenge, the statute is constitutional. Should this Court undertake to further define "prurient", or "lust", it would not render the statute unconstitutional. Prurient means what this court says it does. If the Washington statute is unconstitutional, then by necessity *Roth* and *Miller* should be reversed.

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[9]The only material made available to the trial court was appellants' (defendants') appendix, a magazine entitled "Tit and Body Torture". The magazine was offered by appellants to show the legitimate scope of the challenged statute. Appellees vigorously opposed the admission of the document by a motion to strike, denied by the trial court in an order dated June 8, 1982. On March 28, 1983 appellees again moved to strike the document from the record on appeal, denied by the panel hearing the oral argument.

III.

CONCLUSION

The appellees, here aided by the Court of Appeals, attempt to deprive the states of the ability to legislate their own laws in the area of obscenity. *Miller* cautioned this was not the function of the courts. *Miller*, 413 U.S. at 25. Appellees replace the judicial *meaning* of prurient with one single, fixed *definition*. Appellees' microscope inspection of the Washington statute demands impossible precision which *Roth* held not to be required in the terminology used in state obscenity statutes. *Roth*, 354 U.S. at 491; *Miller*, 413 U.S. at 27-28. Further appellees would require a state legislature to freeze a jury to their single, fixed definition — invading the purpose and province of jury instructions. *Smith v. United States*, 431 U.S. 291, 302 (1977). The Washington Statute is facially constitutional in that it fits within the paremeters set by this Court in *Roth* and *Miller*.

For these reasons, appellants respectfully request this Court reverse the decision of the Court of Appeals.

DATED this _____ day of February, 1985.

Respectfully Submitted,

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No. 84-143

In The
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October Term, 1984

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Appellants,

vs.

J-R DISTRIBUTORS, INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RENEWED MOTION TO DISMISS AS TO APPELLANTS SULLIVAN AND ANDREWS

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Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RENEWED MOTION TO DISMISS AS TO APPELLANTS SULLIVAN AND ANDREWS

Appellee J-R Distributors, Inc. respectfully renews its motion to dismiss the appeals of appellants Jeffrey C. Sullivan and Fred Andrews on the ground of their having been instituted by an untimely

filed joint notice of appeal, thereby depriving this Court of jurisdiction. Supreme Court Rule 16.1(a).

STATEMENT OF FACTS

On or about August 7, 1984 appellees filed a document in this Court entitled "Motion to Dismiss or Affirm." This Motion was made on behalf of all appellees and sought affirmance of the judgment of the United States Court of Appeals for the Ninth Circuit as to all appellants. However, at page 2 of the Motion to Dismiss or Affirm, appellee J-R Distributors, Inc. individually moved to dismiss the appeals of appellants Jeffrey C. Sullivan (Prosecuting Attorney for the County of Yakima, State of Washington), and Fred Andrews (City Attorney for the City of Yakima, State of Washington) on the ground that these two appellants had failed to file a timely notice of appeal.

On October 1, 1984, this Court noted probable jurisdiction over the appeals filed in No. 84-28 [Brockett v. Spokane Arcades, Inc., et al.] and No. 84-143 [Eikenberry et al. v. J-R Distributors, Inc., et al.]. However, the Court's order did not specifically mention the included motion to dismiss on jurisdictional grounds as to appellants Andrews and Sullivan only. Counsel has been advised by this Court's staff that renewal of the motion solely as to appellants Andrews and Sullivan would not be inappropriate.

Appellants Andrews and Sullivan are defendants in only one of the seven District Court actions which were appealed to the Ninth Circuit Court of Appeals. The only plaintiff in that action is appellee J-R Distributors, Inc. The Ninth Circuit's judgment is now on appeal to this Court.

Appellants Andrews' and Sullivans' appeals were apparently docketed with those of other appellants in No. 84-143.

In appellees' previously filed Motion to Dismiss or Affirm, they pointed out that the Court of Appeals entered its judgment on February 6, 1984 [see Exhibit "C-1" of appellant Eikenberry's Jurisdictional Statement] and its order denying rehearing on April 6, 1984 [see Exhibit "D-1" of appellant Eikenberry's Jurisdictional Statement]. [Pursuant to Rule 11.3 of this Court, the time for filing the notice of appeal in the Court of Appeals "runs from the date of the denial of rehearing" in a case, such as the present one, where a rehearing had been requested.]

As appellees pointed out at p. 2 of their Motion to Dismiss or Affirm, appellants Sullivan and Andrews jointly prepared a notice of appeal which was not filed in the Court of Appeals until July 9, 1984, 94

days after the date on which the Ninth Circuit denied the Petition for Rehearing. [A copy of the Notice of Appeal filed by appellants Sullivan and Andrews appears in the Joint Appendix at p. 75. Although the date of filing in the Court of Appeals does not appear on the face of this copy, all parties agree that this Notice of Appeal was filed in the Court of Appeals on July 9, 1984 -- see p. 2 of the Brief For Appellants Eikenberry, et al.] Neither Mr. Sullivan nor Mr. Andrews has sought relief from their untimely joint filing.

Although appellants Sullivan and Andrews did not file their own Jurisdictional Statements or Opening Briefs, their

names appear (inconsistently [1/]) in the briefing filed by Attorney General Eikenberry in No. 84-143.

[1/] At p. 31 of Brief for Appellants Eikenberry, et al., some confusion on this point was created by including the words "Jeffrey C. Sullivan ... for Fred Andrews" [emphasis added] under the heading "Additional Appellants," thereby creating the erroneous impression that Mr. Sullivan is in fact neither a defendant nor an appellant herein. In fact, both Mr. Sullivan and Mr. Andrews were named as defendants in appellee J-R Distributors' complaint [see p. 29 of the Joint Appendix] and, as noted above, both joined in the filing of the untimely Notice of Appeal herein at issue.

Confusion also has been caused by the fact that the Jurisdictional Statement filed in No. 84-143 lists Mr. Sullivan as one of the "Additional Appellants" but entirely omits any reference to Mr. Andrews. Arguably, an additional ground for dismissal exists as to appellant Andrews because no jurisdictional statement was ever filed on his behalf.

THE FILING OF THE UNTIMELY NOTICE OF APPEAL IN NO. 84-143 BY APPELLANTS SULLIVAN AND ANDREWS DEPRIVES THIS COURT OF JURISDICTION TO CONSIDER THEIR APPEALS AND COMPELS AN ORDER OF DISMISSAL AS TO THEM.

The filing of a timely Notice of Appeal is a necessary prerequisite to the exercise of this Court's jurisdiction. In pertinent part, Article III, § 2, ¶ 2 of the United States Constitution provides:

> "[T]he Supreme Court shall have appellate jurisdiction ... under such regulations as the Congress shall make."

In 28 U.S.C. § 2101(c) Congress expressly provided that this Court's appellate jurisdiction may only be invoked where a notice of appeal is timely filed within 90 days of the decision below.

> "Any other appeal ... intended to bring any judgment or decree in a civil action ... before the Supreme Court for review shall be taken or applied for within 90 days after the entry of such judgment or decree." (Emphasis added.)

Congress' use of the word "shall" in the statutory provision quoted above clearly indicates that the 90 day time period was intended to be mandatory and jurisdictional.

The comparable congressional provisions for the time to file notices of appeal to Courts of Appeals from final District Court judgments have been uniformly construed as imposing an absolute jurisdictional bar in cases where a notice of appeal is filed beyond the statutorily designated time period. See Browder v. Director, Illinois Dept. of Corrections, 434 U.S. 257, 264 (1978) and the numerous cases there cited. This same Congressionally imposed time limit for the filing

of a Notice of Appeal was most recently construed by this Court in Griggs v. Provident Consumer Discount Co., __ U.S. __, 103 S.Ct. 400 (1982). In that case, this Court held that "[t]he filing of a notice of appeal is an event of jurisdictional significance" [__ U.S. at ___, 103 S.Ct. at 402] and concluded by stating:

> "It is well settled that the requirement of a timely notice of appeal is 'mandatory and jurisdictional.' Browder v. Director, Illinois Dept. of Corrections, 434 U.S. 257, 264 (1978)." Griggs, supra, __ U.S. at __, 103 S.Ct. at 403.

Although there is little case law arising directly under 28 U.S.C. § 2101(c), this Court held that the time limits imposed for the taking of an appeal to this Court under the predecessor statute to 28 U.S.C. § 2101 were indeed jurisdictional and that the failure to comply with them required dismissal of the appeal. Whitsitt

v. Union Depot & R. Co., 122 U.S. 363 (1887).

Furthermore, the time for filing a notice of appeal to this Court may not be extended. This provision is expressly set forth in Rule 11.4 of this Court and is necessarily implied in the language of 28 U.S.C. § 2101(c). After providing that an appeal "shall be taken or applied for within ninety days after the entry of ... judgment," the statute provides: "A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding 60 days." The statute's failure to contain a comparable provision regarding the time for taking appeals is necessarily dispositive of the question of Congress' intent.

Finally, this Court also necessarily lacks jurisdiction to treat the untimely notice of appeal as a timely petition for

certiorari. Just as 28 U.S.C. § 2101(c) sets forth the constitutionally imposed jurisdictional limitations upon this Court's appellate power, so does it also set forth the jurisdictional limitations upon this Court's exercise of its certiorari power.

While 28 U.S.C. § 2101(c) provides that "[a] justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding 60 days", this provision can be of no avail to appellants Andrews and Sullivan because they never sought an extension nor have they demonstrated "good cause" for their late filing. Absent the filing of such a statutorily required showing of "good cause," the filing of a certiorari petition within the required 90 days is mandatory and jurisdictional. 28 U.S.C. § 2101(c). See, e.g.: Rust Land and Lumber Company v.

Jackson, 250 U.S. 71, 76 (1919) and Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 417-418 (1923)

It is respectfully submitted that this Court is juridictionally precluded from taking any further steps in these actions regarding appellants Sullivan and Andrews other than to dismiss their appeals as having been initiated by an untimely filed joint notice of appeal.

CONCLUSION

For the foregoing reasons, the appeals of appellants Sullivan and Andrews should be dismissed as having been instituted by an untimely filed joint notice of appeal.

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Respectfully submitted,

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